STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

R. KEITH HOELLER Complainant, vs. GREEN RIVER COLLEGE, Respondent.	CASE 127690-U-15 DECISION 12528-B - CCOL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

R. Keith Hoeller appeared on his own behalf.

John Clark, Assistant Attorney General, Attorney General Robert W. Ferguson, for Green River College.

On October 29, 2015, R. Keith Hoeller filed an unfair labor practice (ULP) complaint against his former employer, Green River College (employer or the college).[1] Based on the facts alleged in the complaint, the Commission's Unfair Labor Practice Manager was unable to conclude that a cause of action existed and she issued a deficiency notice on November 17, 2015.

On December 8, 2015, Hoeller filed an amended complaint. On January 6, 2016, the Unfair Labor Practice Manager issued a preliminary ruling and order of partial dismissal, allowing five causes of action against the employer, dismissing one allegation against the employer as untimely, and dismissing all allegations against the union.[2] Hoeller filed a timely appeal to the Commission

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[1] Hoeller also filed a ULP complaint against the union, the Green River United Faculty Coalition, on October 29, 2015. That complaint was docketed as Case 127691-U-15 and ultimately dismissed by the ULP Manager on January 6, 2016, for failure to state a cause of action. *Green River College (Green River United Faculty Coalition)*, Decision 12529 (CCOL, 2016). Hoeller appealed to the Commission, which affirmed the dismissal of the ULP complaint against the union and affirmed the five preliminary ruling allegations against the employer originally issued on January 6, 2016. *Green River College (Green River United Faculty Coalition)*, Decision 12529-A (CCOL, 2016).

[2] *See supra* note 1.

regarding the dismissed allegations. The Commission affirmed the ULP Manager's decision on June 23, 2016. *Green River College,* 12528-A (CCOL, 2016). The Commission also explained that filing an amended complaint does not alter the statute of limitations period unless the amended complaint contains new factual allegations. *Id.* Hoeller's December 8, 2015, amended complaint did not contain any new factual allegations and only provided details and dates related to the original complaint filed on October 29, 2015. Therefore, the Commission found the October 29 and December 8, 2015, complaints were timely for events that occurred on or after October 29, 2013.[3] On January 2, 2018,[4] Hoeller filed a second amended complaint alleging additional causes of action against the employer. On January 11, 2018, Examiner Page Garcia issued an amended preliminary ruling finding that three additional causes of action existed against the employer. The employer filed a timely answer to the second amended complaint. Examiner Garcia held the hearing on January 19, 29, and 31, 2018; April 3, 2018; May 21 and 22, 2018; and June 12, 2018. The parties filed post-hearing briefs on September 12, 2018, to complete the record.

ISSUES

1. Did the employer discriminate against Hoeller in reprisal for union activities by:

   (a) Assigning faculty members with a history of animosity toward Hoeller to observe and evaluate his teaching since October 29, 2013?

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[3] At the time of filing the original complaint, the Commission applied a two-year statute of limitations for ULP complaints filed under Chapter 28B.52 RCW. *See Green River College*, Decision 12528-A (CCOL, 2016) (highlighting that the Commission refused to depart from established Commission two-year statute of limitation precedent or alter the applicable statute of limitations where the legislature declined to do so). Effective June 7, 2018, the legislature amended RCW 28B.52.065 to reflect a six-month statute of limitations for filing a ULP complaint. For the original October 29, 2015, complaint, alleged events occurring prior to October 29, 2013, would not be timely.

[4] *See supra* note 3. However, the second amended complaint was timely for events that occurred on or after January 2, 2016.

(b) Modifying the position description for a tenure-track position in philosophy in order to exclude Hoeller from qualifying for the position since January 2015?

(c) Insisting on evaluating Hoeller's teaching during the fall 2015 academic quarter while Hoeller was sick with the flu?

(d) Failing to offer teaching assignments to Hoeller for the summer 2015 academic quarter?

(e) Modifying the course offering schedule to deny Hoeller an opportunity to teach more than two courses during the fall 2015 academic quarter?

2. Did the employer discriminate against Hoeller in reprisal for filing a ULP complaint by:

(a) Failing to offer Hoeller teaching assignments for the summer 2016 academic quarter?

(b) Failing to offer Hoeller more than two classes for the fall 2016 academic quarter?

(c) Reducing the number and types of courses normally taught by Hoeller thereby causing him to be constructively discharged on September 8, 2016?

<u>Issue 1(a)</u>

Hoeller engaged in protected collective bargaining activity. However, he failed to establish that he was deprived of any ascertainable right, benefit, or status by faculty members with a history of animosity observing or evaluating his teaching since October 29, 2013. Therefore, he was unable to establish a prima facie case for discrimination. Even if a reviewing body were to find he was deprived of any ascertainable right, benefit, or status, the Examiner finds no causal connection between his statutorily protected activity and the employer's action(s). Withstanding the failure

to prove a causal connection, he provided insufficient evidence to support that the employer's proffered reasons were pretexts or that the employer was substantially motivated by union animus. As such, Issue 1(a) is dismissed.

Issue 1(b)

Hoeller engaged in protected collective bargaining activity. However, he failed to establish that he was deprived of any ascertainable right, benefit, or status by the employer's 2015 modification to the tenure-track position in philosophy. Therefore, he was unable to establish a prima facie case for discrimination. Even if a reviewing body were to find he was deprived of any ascertainable right, benefit, or status, the Examiner finds no causal connection between his statutorily protected activity and the employer's action(s). Withstanding the failure to prove a causal connection, he provided insufficient evidence to support that the employer's proffered reasons were pretexts or that the employer was substantially motivated by union animus. As such, Issue 1(b) is dismissed.

Issue 1(c)

Hoeller engaged in protected collective bargaining activity. However, he failed to establish that he was deprived of any ascertainable right, benefit, or status by the employer's administration of student evaluations in his fall 2015 academic quarter, or even in his winter 2015 academic quarter. Therefore, Hoeller was unable to establish a prima facie case for discrimination and Issue 1(c) is dismissed.

Issue 1(d)

Hoeller engaged in protected collective bargaining activity. However, he failed to establish that he was deprived of any ascertainable right, benefit, or status by the employer failing to offer him teaching assignments for the summer 2015 academic quarter. Therefore, he was unable to establish a prima facie case for discrimination. Even if a reviewing body were to find he was deprived of any ascertainable right, benefit, or status, the Examiner finds no causal connection between his statutorily protected activity and the employer's action(s). Withstanding the failure to prove a causal connection, he provided insufficient evidence to support that the employer's

proffered reasons were pretexts or that the employer was substantially motivated by union animus. As such, Issue 1(d) is dismissed.

Issue 1(e)

Hoeller engaged in protected collective bargaining activity. However, he failed to establish that he was deprived of any ascertainable right, benefit, or status by the employer failing to offer him teaching assignments for the fall 2015 academic quarter. Therefore, he was unable to establish a prima facie case for discrimination. Even if a reviewing body were to find he was deprived of any ascertainable right, benefit, or status, the Examiner finds no causal connection between his statutorily protected activity and the employer's action(s). Withstanding the failure to prove a causal connection, he provided insufficient evidence to support that the employer's proffered reasons were pretexts or that the employer was substantially motivated by union animus. As such, Issue 1(e) is dismissed.

Issue 2(a)

Hoeller engaged in protected collective bargaining activity. However, he failed to establish that he was deprived of any ascertainable right, benefit, or status by the employer failing to offer him teaching assignments for the summer 2016 academic quarter. Therefore, he was unable to establish a prima facie case for discrimination. Even if a reviewing body were to find he was deprived of any ascertainable right, benefit, or status, the Examiner finds no causal connection between his statutorily protected activity and the employer's action(s). Withstanding the failure to prove a causal connection, he provided insufficient evidence to support that the employer's proffered reasons were pretexts or that the employer was substantially motivated by union animus. As such, Issue 2(a) is dismissed.

Issue 2(b)

Hoeller engaged in protected collective bargaining activity. However, he failed to establish that he was deprived of any ascertainable right, benefit, or status by the employer failing to offer him more than two classes for the fall 2016 academic quarter. Therefore, Hoeller was unable to establish a prima facie case for discrimination and Issue 2(b) is dismissed.

Issue 2(c)

Hoeller engaged in protected collective bargaining activity. However, he failed to establish that the employer deprived him of any ascertainable right, benefit, or status by the employer offering him less classes or types of classes. Therefore, he was unable to establish a prima facie case for discrimination. The Examiner finds that Hoeller was not constructively discharged. The Examiner also finds that the employer did not discriminate against him in reprisal for filing a ULP complaint and Issue 2(c) is dismissed.

BACKGROUND

From 1991 to 2016, Hoeller taught a variety of philosophy classes as an adjunct professor in the humanities division at Green River College. Community college adjunct faculty in Washington are considered part time, as opposed to tenured faculty who are considered full time. Both full-time faculty and part-time faculty fall under the statutory umbrella of "academic employees," and are included in the same bargaining unit.[5]

Early in his community college career, Hoeller taught philosophy part time at other community colleges in order to supplement his income. Eventually, Green River College began to offer him sufficient class assignments, and he worked solely at that campus for many years. Hoeller first became active advocating for part-time faculty rights in the mid-1990s when he was denied unemployment benefits. At that time, Hoeller joined the part-time faculty caucus of the American Federation of Teachers (AFT) and visited the State Senate Appropriations Committee. In 1997, Hoeller formed the Washington Part-Time Faculty Association. Hoeller continued to campaign for improved working conditions for adjunct faculty both statewide and nationally. Through his labors including publication of approximately 40 op-ed articles, testifying before the state legislature, and filing class-action lawsuits, Hoeller championed settlements with the State Board of Education for millions of dollars distributed to the state's adjunct faculty and improved the qualification standards for healthcare and retirement benefits. In 2011, he and other advocates

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5 RCW 28B.52.020(2); RCW 28B.52.030.

formed the Green River Adjunct Faculty Association, or GRAFA, in order to advocate for and educate adjunct faculty.

In his total time at Green River College, Hoeller and his personal representative and adjunct colleague, Kathryn Re, filed approximately thirteen grievances. Eight of these were filed within the two-year statute of limitations period for the original and first amended complaints, or from October 29, 2013, to October 29, 2015.

ANALYSIS

Did the employer discriminate against Hoeller in reprisal for union activities (Issues 1(a) through 1(e)), or for filing a ULP complaint (Issues 2(a) through 2(c))?

Applicable Legal Standards

Chapter 28B.52 RCW governs the collective bargaining relationship between community college employers and their academic personnel. RCW 28B.52.073(1)(c) states that it is an unfair labor practice for an employer to encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure of employment, or any term or condition of employment.

An employer unlawfully discriminates against an employee when it takes action in reprisal for the employee's exercise of rights protected by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. *Educational Service District 114*, Decision 4361-A (PECB, 1994). The complainant maintains the burden of proof in a discrimination case. To prove discrimination, the complainant must establish a prima facie case by showing that:

1. The employee participated in protected activity or communicated to the employer an intent to do so;
2. The employer deprived the employee of some ascertainable right, benefit, or status; and
3. A causal connection exists between the employee's exercise of protected activity and the employer's action.

King County, Decision 12582-D (PECB, 2018), *citing City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. 333, 348-349 (2014); *Educational Service District 114*, Decision 4361-A.

Ordinarily, an employee may use circumstantial evidence to establish the prima facie case because respondents do not typically announce a discriminatory motive for their actions. *Clark County*, Decision 9127-A (PECB, 2007). Circumstantial evidence consists of proof of facts or circumstances which according to common experience give rise to a reasonable inference of the truth of the fact sought to be proved. *See Seattle Public Health Hospital*, Decision 1911-C (PECB, 1984).

If the complaining party establishes a prima facie case, the burden of production shifts to the respondent. *King County*, Decision 12582-D (PECB, 2018), *citing City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349; *Port of Tacoma*, Decision 4626-A (PECB, 1995). The respondent may articulate a legitimate, nondiscriminatory reason for the adverse employment decision. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. At 349. If the respondent meets its burden of production, then the complainant bears the burden of persuasion to show the employer's stated reason was either a pretext or substantially motivated by union animus. *Id.*

The Washington State statute governing faculty at state community colleges explicitly addresses employer discrimination against employees who have engaged in protected collective bargaining activity. RCW 28B.52.070. The enforcement of these rights is through RCW 28B.52.073. These rights are not absolute, however, and an employee is not immune from disciplinary actions just because he or she has engaged in union activity. *City of Vancouver v. Public Employment Relations Commission*, 107 Wn. App. 694 (2001); *Vancouver School District v. Service Employees International Union, Local 92*, 79 Wn. App. 905 (1995), *review denied*, 129 Wn.2d 1019 (1996).

The exercise of protected activity has been found to include: the filing of a grievance or ULP complaint, *Dieringer School District*, Decision 8956-A (PECB, 2007), *citing Mukilteo School District*, Decision 5899-A (PECB, 1997); union organizing activity, *Asotin County Housing Authority*, Decision 2471-A (PECB, 1987); and acting as the union president and participating in collective bargaining with the employer, *Oroville School District*, Decision 6209-A (PECB, 1998).

Application of Standards

First Prong of a Prima Facie Case: Protected Activity

By filing grievances, advocating for adjunct faculty with the employer and legislature, and publishing articles critical of the current adjunct system, the Examiner finds that Hoeller engaged in protected activity. Further, based on Hoeller's numerous grievances and appeals to the college's deans and the board of trustees, the Examiner finds that the employer was fully aware of Hoeller's protected union activity. Thus, for the original and first amended complaints filed October 29, 2015, and December 8, 2015, Issues 1(a) through 1(e), Hoeller established that he engaged in protected activity, meeting the first prong of his prima facie case.

By the filing of the second amended complaint on January 2, 2018, Hoeller also engaged in the protected activity of filing a complaint with the Commission. The employer had notice of filing of the complaint, as evidenced by the certificate of service, as well as the involvement of the administration and the Washington State Attorney General's office in responding to the complaint. As such, the employer was aware of Hoeller's protected activity. Therefore, Hoeller also met the first prong of the prima facie case for Issues 2(a) through 2(c) in his second amended complaint filed on January 2, 2018.

Second Prong of a Prima Facie Case: Deprivation of an Ascertainable Right, Benefit, or Status

Whether the employer deprived Hoeller of an ascertainable right, benefit, or status is the second prong of the prima facie case. Such determinations are considerably fact driven and while a particular set of facts may establish a deprivation in one case, other cases with similar facts may not.

A recent Commission decision determined that a performance evaluation that is less than favorable because of protected activity is a deprivation. *King County*, Decision 12582-D. In that case, the supervisor strongly alluded to the employee's protected conduct at a staff meeting in her performance evaluation. Despite assessing the employee as meeting leadership standards, the supervisor's choice of words in the evaluation ("[She] sometimes struggled to channel [her] passion in a positive way.") coupled with the supervisor's testimony at hearing led the Commission to find the inference that her criticism included the employee's protected activity. *Id.*

Other Commission decisions have found that employer actions were not deprivations of ascertainable rights. In *City of Yakima*, Decision 10270-B (PECB, 2011), the Commission held that an employer's negative comments added to an employee's performance evaluation were not a deprivation of a right, benefit, or status. In that case, a supervisor added a comment that the complainant had demonstrated a "pattern of rudeness to citizens," within three months of her participation on both the union bargaining team and as a witness at an interest arbitration. The Commission disagreed with the Examiner's findings that the evaluation comments would negatively impact the employee in the future and determined that the supervisor's performance comments did not constitute discipline or deprive the employee in any meaningful way of any right, benefit, or status.

Even if the Commission in *City of Yakima* upheld the Examiner's findings and determined that the union had established that the employee was deprived of a right, benefit, or status, the Commission was not persuaded that a causal connection existed between the employee's protected activities and the employer's performance evaluation comments. The Commission in *City of Yakima* did not focus on the short proximity in time between the protected activity and the performance evaluation comments. The Commission determined that the "pattern of rudeness to citizens" comment on the evaluation was merely pointing out a fact that was backed up by the evidence in the record, namely, the employer's receipt of eight citizen complaints within a five-month period just prior to the performance evaluation. *Id.*

Citing *City of Yakima*, an examiner found that documenting a customer service incident on a non-investigatory matter (NIM) was not intended to be disciplinary. *Port of Seattle*, Decision 11848 (PECB, 2013), *aff'd*, *Port of Seattle*, Decision 11848-A (PECB, 2014). As three NIMs were required within a year in order for "intervention," and no policy violation was cited in the NIM, the Examiner found that the employer's action was not a form of discipline, nor was the complainant deprived of an ascertainable right, benefit, or status.

Third Prong of a Prima Facie Case: Causal Connection

Whether a causal connection exists between the employee's exercise of protected activity and the employer's action(s) is the third prong of the prima facie case. Determinations of a causal

connection are also fact driven and while a particular set of facts may establish a causal connection, other cases with similar facts may not.

The second and third prongs required to establish a prima facie case, as well as the subsequent elements of a discrimination case under Chapter 28B.52 RCW (employer's offered legitimate nondiscriminatory reason and the complainant's proof of the employer's pretext or substantial motivation based on union animus), will be analyzed for each issue separately below.

ISSUE 1(a), Second Prong of the Prima Facie Case: Did the employer deprive the complainant of an ascertainable right, benefit, or status?

Hoeller alleged that the employer assigned faculty members with a history of animosity toward him to observe and evaluate[6] his teaching since October 29, 2013. Specifically, Hoeller's brief asserts that Sandra Johanson and Ty Barnes, full-time tenured faculty at the college and alternating leads in the philosophy department, as well as Will Scott, former chair of the humanities division, all harbored animosity toward him. As full-time faculty, Johanson, Barnes, and Scott were in the same bargaining unit as Hoeller, a part-time faculty member.[7]

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[6] Given the totality of the record, the Examiner's analysis takes into account classroom observations and student evaluations of Hoeller's classes for the terms "observe" and "evaluate."

[7] *See supra* note 5.

Barnes observed one of Hoeller's classes during fall 2009 academic quarter.[8, 9] Johanson observed two of Hoeller's philosophy classes (on March 12, 2014, with a report issued April 3, 2014; and on January 20, 2015). Scott observed one of Hoeller's classes on March 5, 2015. Only the latter three observations occurred during the two-year statute of limitations. Neither Barnes, Johanson nor Scott testified at the hearing.

During the spring of 2012, Scott filed a complaint against Hoeller stemming from a disagreement they had on the division's implementation of an alleged new policy on student evaluation administration.

On November 26, 2012, Hoeller and adjunct colleague Emma Smith filed a grievance against Scott indicating that he was violating Article V of the parties' collective bargaining agreement (CBA)[10] as it pertained to student evaluations of adjuncts. Derek Brandes, then vice president of instruction, denied the grievance as untimely under the CBA but, based on his investigation, addressed how the division chairs had conducted student evaluations since 2008: "If an adjunct is up for two classes in a given quarter, *the division has allowed the adjunct to select one [for the*

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8 Barnes' fall 2009 observation and Hoeller's subsequent complaint to Kathleen Loucks (humanities division chair at the time) appear to be at least one catalyst of several issues related to allegations in the original and first amended complaints. Hoeller filed a complaint with Loucks about Barnes' 2009 class observation report and contrasted it with another observation of the same class in fall 2009 by the former chair of the union's tenure committee, Anita Behrbaum. In his complaint, Hoeller lists several areas where Behrbaum's descriptions of Hoeller were much more flattering than Barnes' descriptions.

Hoeller filed a separate complaint in 2009 regarding an e-mail in which Barnes requested that all philosophy department faculty get together on paid time for an In-Service Day. There was controversy over whether adjunct faculty received any compensation for participating in the In-Service Day. Ultimately, Barnes apologized to the department via e-mail about the confusion and clarified that while adjunct faculty were invited to attend the In-Service Day they would not be compensated for their attendance.

9 Evidence prior to the statute of limitations is allowed in order to provide context to support the complaint. *State – Washington State Patrol*, 10314-A (PECB, 2010). *See also State – Ecology*, 12732-A (PSRA, 2017) (allowing that evidence of events occurring outside of the six-month statute of limitations can be relevant and is admissible to establish background leading to the complained-of conduct). *City of Seattle*, Decision 5852-C (PECB, 1998) (providing that although a cause of action cannot exist as to events occurring outside the statute of limitations period, that does not preclude consideration of those events as background information to support the complaint).

10 *Agreement between the Board of Trustees Community College District No. 10 and the Green River United Faculty Coalition*, effective December 14, 2011, to June 1, 2014. This CBA remained in effect until the execution of the successor CBA on September 12, 2016, effective through June 30, 2018. All further decision references to the parties' CBA contemplate the provisions of the CBA effective December 14, 2011.

administration of student evaluations]." (emphasis added). Brandes also confirmed that student evaluation administration to adjuncts in the post-file status[11] had been inconsistent.

On March 11, 2013, Johanson and Barnes filed with Scott an "Update of Ongoing Formal Complaint against Keith Hoeller." They cited examples of Hoeller's "failure to collaborate" starting in winter 2009 when Hoeller "chose to go to the Union with a complaint that he was being unfairly forced to participate . . . ." They further noted that "by attempting to bypass the ordinary process for dealing with any complaint, Keith Hoeller has driven a wedge between himself and our department." Johanson and Barnes described another example of Hoeller's "failing to collaborate" in their March 11, 2013, complaint, that occurred on March 4, 2013. Regarding this instance, the update stated, "As usual Keith did not communicate any of his concerns to Ty or me. Instead, he chose to take a hostile approach and file yet another grievance."

Based on Johanson and Barnes' complaints, Christie Gilliland, dean of instruction, issued Hoeller a directive on May 2, 2013. Gilliland provided three expectations in the directive:

1. Respond to e-mail[s] that request a response in a reasonable period of time.
2. Comply with requests for student evaluations as part of the contractual adjunct file and post-file evaluation processes and with requests to meet with the department faculty, Division Chair or Dean as requested to discuss any concerns that may arise as a result of those evaluations.
3. Comply with requests for peer observations as part of the contractual adjunct file and post-file evaluation processes and with requests to meet with the department faculty, Division Chair or Dean as requested to discuss any concerns that may arise as a result of those evaluations.

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11 Article V, Section P (9) addresses how adjunct faculty are evaluated once they have successfully been placed in the Adjunct Faculty Employment File under Article V, Section P (4)(g). The parties commonly referred to the processes under Article V, Section P (9) as "post-file review" or "post-file status."

Gilliland's directive advised that it was not a disciplinary action but a copy would be placed in Hoeller's personnel file.[12] Gilliland also wrote, "I will also note that while this is not a disciplinary action, failure to comply with this directive could potentially result in disciplinary action in the future."

On October 21, 2013, Johanson and Barnes filed a second formal complaint against Hoeller with Scott:

> This is a formal complaint from the philosophy department against Keith Hoeller who continues to demonstrate a failure to fulfill the basic functions of an adjunct faculty member according to Article V, Section F of the current negotiated contract . . . "The Instructor will communicate and work collaboratively with the Division, department lead, and the Division Chair."

Further in the complaint, Johanson and Barnes allege:

> By filing this grievance and issuing this demand [for a spring 2014 class] to Dr. Brandes, Keith has once again demonstrated an unwillingness to collaborate with the philosophy department to seek equitable solutions to his concerns. We feel that this latest behavior is another example of Keith's failure to fulfill the basic functions of an adjunct according to Article V, Section F of the contract.

On December 17, 2013, Joyce Hammer, the dean of English, humanities, and business at that time, responded to Johanson and Barnes' October 21, 2013, complaint. Hammer concluded that no formal disciplinary action would be taken based on the complaint but advised Hoeller that "we do have ongoing concerns with your communication and request you continue to work with your division colleagues to improve the communication both electronically and face-to-face." Hammer further wrote, "Your poor communication includes . . . contacting administrators (see

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[12] The complainant and respondent both submitted copies of Gilliland's May 2, 2013, directive (Complainant Ex. 46 and Employer Ex. 4). For both exhibits, the first page appears identical. However, the second and final page is different: the complainant's exhibit includes the paragraph that begins, "This is not a disciplinary action, but a copy of this memorandum will be put into your personnel file;" the employer's exhibit does not contain that paragraph. The complainant's exhibit indicates that the May 2 directive was courtesy copied to administrators only within the college; the employer's exhibit indicates that the executive director and chair of the Board of Community and Technical Colleges were courtesy copied. The latter would be very unusual recipients of a directive. Given the totality of the evidence, including Complainant Ex. 47 and both parties' testimony, the Examiner finds Complainant Ex. 46 as the credible document that is referenced in the body of the decision.

attached letter dated October 2, 2013)[13] to resolve issues in the Humanities Division instead of directly and effectively communicating with the department lead or Division Chair." Hammer concluded her letter advising that in evaluating Johanson and Barnes' complaint, she gave no weight or consideration as to whether Hoeller had filed any grievances.

On February 18, 2014, Hoeller filed a grievance alleging CBA violations when Johanson and Barnes conducted student evaluations in two of his classes.[14] He alleged that conducting student evaluations in two classes was more than the past practice of one class per adjunct, per semester. Hoeller's grievance stated that Johanson and Barnes carried out the student evaluations in order to harass him.

On April 3, 2014, Johanson submitted a report of the March 2014 observation she conducted for one of Hoeller's classes and suggested that he stand up and walk around if he were able. She also suggested that Hoeller remind students to take notes and to use the board and PowerPoint presentations. Johanson reported that Hoeller told a personal story she found "quite moving" and noted that the students were "riveted."

On November 7, 2014, Barnes e-mailed Hoeller and another adjunct, Marvin Will, to request a post-file review of both observations and student evaluations of their respective classes.

On November 20, 2014, Kate Katims, division chairperson, e-mailed Hoeller to advise that there was no record of an observation in his Philosophy 160 (Intro to Philosophy of Science) class. Katims advised Hoeller that Marisela Fleites-Lear volunteered to conduct his observation on November 24 or 25 and explained Fleites-Lear's teaching credentials, including that she taught

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[13] The October 2, 2013, e-mail from Hoeller to Brandes raised concerns about Barnes assigning classes to adjuncts with less seniority than Hoeller in the part-time file. Hoeller's e-mail refers to the CBA and cites Article V, Section P. At the hearing, Hoeller testified that his October 2, 2013, e-mail to Brandes was <u>not</u> a grievance.

[14] Only Brandes' February 26, 2014, response to Hoeller's February 18, 2014, grievance was offered for the record. It is not clear from Brandes' response whether the student evaluations that Hoeller complained of actually occurred at the time of Brandes' response or were going to occur. No further evidence in the record reflects the February 2014 student evaluations or any tangible employment action resulting from them if they did, in fact, occur.

Hoeller's class while he was out ill. Most importantly, Katims indicated that offering Fleites-Lear to do the observation was an acknowledgment of Hoeller's request that neither Barnes nor Johanson conduct his class observation.

On November 24, 2014,[15] Kathryn Re e-mailed Brandes on behalf of Hoeller, raising concerns that the observers assigned to Hoeller's classes lacked impartiality. In particular, Re pointed to Barnes and Johanson as being biased due to the several pending grievances. Re indicated that Katims' proposal to have Fleites-Lear observe did not provide proper notice, violated the CBA, provided insufficient time to involve the union, and did not allow time for Hoeller to prepare. Re did not identify if or how she thought Fleites-Lear lacked impartiality.

On December 1, 2014, Hoeller filed a grievance with Brandes seeking a cessation of the "New Humanities Division Policy." Brandes responded on December 3, 2014, denying the grievance but also wrote that he was, "concerned about inconsistent evaluation processes based on modalities."

On January 20, 2015, Johanson observed Hoeller and indicated that the students were "very engaged." Further, she noted that Hoeller called the students by name and that they seemed willing and prepared to contribute. She also indicated that his syllabus description did not match the course adoption and revision form and that the syllabus lacked five items.

On March 3, 2015, Hoeller sent a letter to Liz Becker, division chairperson, indicating he objected to Scott, Barnes, and Johanson conducting his class observations due to earlier complaints they had filed against him.

On March 5, 2015, Scott conducted an observation of Hoeller's class. Scott's report detailed the "solid rapport" Hoeller exemplified with the students and the teaching skills utilized to address multiple learning styles. Scott's report also suggested to Hoeller a video for class content and that he include an Americans with Disabilities Act (ADA) statement on the syllabus.

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15 As an aside on timing, the Thanksgiving holiday was celebrated on November 27, 2014.

On March 13, 2015, Becker administered student evaluations in all three of Hoeller's classes, despite his objections about not being present because he was ill. Hoeller's brief argued that Becker, as the chairperson, should not have administered the student evaluations. Article V, Section B of the parties' CBA details the job description for a division chairperson. One basic function in that section includes, "evaluating and reporting in matters related to the division." Under Section B (2) Specific Responsibilities and Authority, the chairperson is tasked with ensuring "the evaluation of adjunct faculty members . . . and coordinat[ing] post-file evaluations."

Amanda Schaefer, interim dean of instruction from April 2014 to June 2017, testified that department observations were based on a rubric whereby the evaluator would look at the instructor's strengths and weaknesses and provide the instructor with feedback. Schaefer was hired by the college in 2008 and became a tenured full-time faculty member in 2011. Schaefer explained, "[E]very instructor has areas to improve, so it was encouraged to also provide feedback in those areas as well."

Schaefer also testified that "when the student evaluations are being conducted, the person who is being evaluated is asked to leave so that the students feel more comfortable giving their anonymous perspective when filling those forms out." Schaefer stated that she was not aware of any observation or student evaluation of one of Hoeller's classes indicating he needed corrective action, discipline, or that would suggest poor teaching quality. The Examiner finds Schaefer's testimony credible.

At the hearing Hoeller testified,

> If you have good evaluations you keep your job if you are an adjunct. If you have bad ones or a stray comment you could lose your job, because we are hired quarter by quarter by quarter . . . . The only form of seniority or job security we have, and that the union has negotiated, is this part-time file.

The part-time file system at the college is unique, according to Hoeller's testimony, and one of the reasons he chose to teach so many classes there. The Adjunct Faculty Employment File, also commonly described as the "part-time file," is addressed in Article V, Section P of the CBA. Specifically, Article V, Section P (8)(a) provides the criteria for class assignment:

> The division chair in consultation with the division shall coordinate and recommend assignments of adjunct faculty members to the dean. Eligible faculty from the adjunct faculty employment file shall be assigned to available classes before adjunct faculty outside the file are assigned to classes. Assignments will be made fairly and equitably considering seniority, academic preparation, teaching experience and other relevant factors, with consideration given to faculty members" [sic] stated schedule preferences.

Further, the employer's brief highlights Hoeller's own testimony on cross-examination wherein Hoeller acknowledged that Johanson's 2015 observation report was "accurate" and "positive." Hoeller agreed on cross-examination that there was nothing in Johanson's report that would concern the college or that would suggest a need for performance improvement. At hearing, the employer introduced the observation reports of Johanson from April 3, 2014, and Scott from March 5, 2015. The employer's brief points out that both reports were complimentary of Hoeller and contained "thoughtful observations."

The record establishes that the employer's humanities division did not appear to follow the established practice of the dean approving a division policy prior to its implementation. In particular, the department changed its internal policy on the frequency of adjunct faculty observations and the administration of student evaluations, as well as its protocol for the philosophy department's assignment of classes. Brandes' 2012 investigation confirmed that the administration of student evaluations in the humanities classes for adjuncts in the post-file status had been inconsistent.

Hoeller vehemently objected to the implementation of the new department evaluation and observation processes and demonstrated his objections through the parties' grievance process. Johanson and Barnes' 2009 and updated 2013 complaints to Scott and Brandes demonstrated their frustration that Hoeller filed grievances with the administration first, rather than talk to them, as department leads first. The tenor of Johanson and Barnes' 2009 and 2013 complaints expressed union animus in their use of such phrases as "go to the union" surrounding Hoeller's choice to file grievances as provided for under the CBA.

While Barnes and Johanson were department leads and not Hoeller's supervisors, their first 2013 updated complaint contributed to the issuance of Gilliland's May 2, 2013, directive.[16] That directive threatened disciplinary action if Hoeller failed to comply. Gilliland directed Hoeller to timely respond to e-mails, to comply with requests for student evaluations and class observations that comported with the CBA, and to meet with department administration or faculty to discuss concerns that arose.

Neither Gilliland's May 2, 2013, directive nor Hammer's December 17, 2013, response to Johanson and Barnes' October 21, 2013, complaint were the subjects of a ULP complaint before this agency.

Issue 1(a): No deprivation of an ascertainable right, benefit, or status

The three class observations conducted by Johanson and Scott between October 29, 2013, and October 29, 2015, did not reflect comments out of the ordinary in performance reviews. They even offered positive feedback, such as "solid rapport with students," "students were very engaged," and that Hoeller's teaching skills addressed multiple learning styles. Further, the record lacks evidence that the few suggestions for improvement offered by Johanson or Scott were later utilized by the employer to make decisions about Hoeller's subsequent class assignments, lack thereof, or any other tangible employment action.

Similarly, the student evaluations that were conducted (despite Hoeller's objections due to his illness, his distrust of who was conducting the student evaluations, and the timing of the evaluations) do not appear to have resulted in any tangible employment action. No student evaluations were introduced at the hearing. In other words, by Johanson and Scott conducting

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[16] The employer's brief argues that as fellow faculty members under the CBA, Johanson and Barnes did not have the authority to administer discipline. Further, the employer implies that because of their status as fellow bargaining unit employees, the employer should not be subject to liability for any animus they may have exhibited. Johanson and Barnes acted with apparent authority on behalf of the administration based on their roles as leads and by the administration's grievance responses to Hoeller that explained Johanson's and Barnes' delegated authority to make class scheduling, observation, and evaluation decisions. *See Kitsap County*, Decision 11675-A (PECB, 2013). The CBA specifies that the division chair may delegate such responsibilities to faculty within the division. Under the established principles of *respondeat superior*, the employer is responsible for any unlawful conduct of its subordinates. *See Bethel School District*, Decision 6731 (EDUC, 1999).

observations and Becker conducting student evaluations, Hoeller was not deprived of any actual right, benefit, or status.

The Examiner finds that Hoeller failed to establish that he was deprived of any actual right, benefit, or status and, therefore, this allegation fails the second prong of the prima facie test for discrimination.

ISSUE 1(a), Third Prong of the Prima Facie Case: Did the complainant establish a causal connection between the protected activity and the employer's action(s)?

If a reviewing body were to determine that Hoeller was deprived of a right, benefit, or status, by the employer conducting the student evaluations and class observations, then the third prong of the prima facie case is to determine whether a causal connection existed between the employee's protected activity and the alleged employment action(s).

The complainant argues that the employer allowed tenured faculty with a history of animosity toward him to conduct student evaluations and class observations. Their animosity, Hoeller avers, developed as a result of his engagement in protected activities.

To belie the alleged causal connection, the employer relies on the opinion of a contracted investigator, Daphne Schneider. In her May 23, 2013, report, Schneider determined that Scott, Johanson, and Barnes filed complaints against Hoeller as a direct result of Hoeller's refusal to work with them and their "resulting frustration." The report determined that Scott, Johanson, and Barnes filed the complaints and conducted themselves without harassment or retaliation. The investigation did not encompass an evaluation of whether Hoeller was discriminated against in connection with his protected union activity but, rather, on whether he had been discriminated or retaliated against, or harassed due to his age.[17]

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[17] Schneider's report analyzed whether Hoeller was discriminated against by the employer based on a protected basis as provided for under Title VII of the Civil Rights Act of 1964 and Chapter 49.60 RCW, the Washington Law Against Discrimination.

The employer's post-hearing brief highlights that the humanities division chairs, who were also in the same bargaining unit as Hoeller, made observation assignments in compliance with the CBA. Further, the employer argues that the observations are used for feedback and not used to determine class assignments to instructors. Marshall Sampson, vice president of legal affairs since June 30, 2014, testified that the CBA requires faculty observers to be in the same division because those faculty members have the most familiarity with the course outcomes.

Article V, Section P (9)(a) and (b) of the parties' CBA, effective December 14, 2011, stated:

> a. Student Evaluations: At a minimum, the division shall collect routine student evaluations of adjunct faculty every fourth quarter of employment.
>
> b. Class Observations: Adjunct faculty in the employment file shall be observed during at least one quarter every three years by the division chair, or designated faculty member of the same division.

The employer avers that it was Hoeller's "poor relationship" with his union and other faculty, coupled with his lack of communication and collaboration, which led to the discord between Hoeller, Scott, Johanson, and Barnes. Finally, the employer points to the three class observation reports it was able to locate, indicating that all three were complimentary and lacked any negative comments regarding Hoeller's teaching.

Issue 1(a): No causal connection between the employee's protected activity and the employer's action(s)

In *State – Corrections*, the timing of a matter of days from the protected activity to the employer's action temporarily removing the employee from his bid post was sufficient for the Examiner to determine that there was a causal connection. *State – Corrections*, Decision 11571 (PSRA, 2012), *aff'd*, *State – Corrections*, Decision 11571-A (PSRA, 2013).

The timing of events and surrounding circumstances of this case are less like *State – Corrections* and more like *Reardan-Edwall School District*, Decision 6205-A (PECB, 1998). The Commission in *Reardan-Edwall* examined the circumstantial evidence of the timing of the protected activity and the employer's adverse actions, as well as the surrounding circumstances of comparative employees who had engaged in protected union activity. "The prolonged sequence

of events[,]" from the timing of the employee's earliest protected activity until the employer's failure to renew her bus driving contract, spanned approximately nine months. The Commission reasoned that the employer could have taken action much sooner had it relied on the employee's earlier protected activity and been driven by union animus. *Id.*

Like *Reardan-Edwall,* the prolonged sequence of events in this case, coupled with the lack of any actual harm to the complainant, failed to establish that a causal connection existed between Hoeller's protected activities and the employer's administration of class observations and student evaluations during the two-year statute of limitations. *Id.*

Further, unlike the *King County* employee evaluations that implicitly referred to the employee's protected union conduct during a staff meeting in the evaluation ("even though [she] sometimes struggled to channel [her] passion in a positive way"), the college's class observations and student evaluations of Hoeller do not take his protected activities into account or reference them implicitly or explicitly. *King County*, Decision 12582-D. Suggestions for improvement alone, such as those found in the three class observations conducted during the statute of limitations period, are insufficient to find a causal connection between the leads' animus and the administration of the observations and evaluations.

The record establishes that the tenured faculty and department chairs either observed or conducted student evaluations of other adjunct faculty, including Smith and Will, outside the bounds of the division's former policy. In other words, the evidence during the two-year statute of limitations period did not establish that Hoeller was targeted for observations or student evaluations by Johanson, Barnes, or Scott based on his protected activity. On direct examination, Hoeller testified that he was not alone in opposing the department's new policy of "increasing monitoring adjuncts by the full-time faculty." Hoeller stated, "I acted in concert with several other adjuncts, including Ron Swift and another woman named Charlotte Fellers." There is no evidence in the record that Swift, Fellers, or any other adjunct faculty engaging in protected activities were subject to a discriminatory application of the department's new observation or evaluation processes.

Should a reviewing body find that Hoeller was deprived of an ascertainable right, benefit, or status when faculty members with a history of animosity toward Hoeller were assigned to observe and

evaluate him, the Examiner finds that Hoeller failed to establish a causal connection between his protected activity and the employer's action(s). As such, the complaint fails to meet all the prongs of a prima facie case for Issue 1(a) and that allegation is dismissed.

ISSUE 1(b): Did the employer modify the position description for a tenure-track position in philosophy in order to exclude Hoeller from qualifying for the position since January 2015?
A full-time tenure track philosophy instructor position announcement from 2007 was admitted into the record. At that time, the announcement required a master's degree but did not contain a requirement for teaching specific courses. The draft versions of the 2015 full-time philosophy instructor position required both a master's degree and an instructor with "experience teaching logic."

Hoeller argues he was deprived of a right, benefit, or status when he was prevented from applying for the 2015 full-time position when the employer added the logic requirement to the tenure-track position. Hoeller's brief points to Schaefer's testimony that the 2015 philosophy position announcement originated with Barnes and Johanson. Hoeller's brief suggests that he was effectively precluded from applying for the 2015 full-time position based on Barnes' and Johanson's animosity toward him and the administration's failure to protect him from discrimination.

Hoeller's original complaint filed on October 29, 2015, acknowledged that most philosophy professors teach logic. Hoeller's complaint stated, "It is unusual for philosophy professors not to teach logic." The complainant alleges in his post-hearing brief that, "[v]irtually all other adjuncts in philosophy taught logic."

The employer argues that Hoeller did not raise concerns about the position announcement to the employer, nor did Hoeller file a grievance over the matter. Further, the employer argues, Hoeller did not apply for the 2015 full-time tenure position.

On January 13, 2015, interim dean Schaefer sent an e-mail to Brandes regarding a full-time philosophy faculty position announcement. The posting was for a one-year replacement effective September 2015 to June 2016 to replace Johanson. Johanson and Becker were courtesy copied on the e-mail. The minimum qualifications included "[e]xperience teaching a symbolic logic

course." On January 29, 2015, Schaefer and Barnes exchanged e-mails regarding the position announcement. Schaefer advised Barnes and Johanson that if they wanted to make changes to the announcement there was still time. Schaefer testified that the only change made at that point was to change the position from a one-year term to a tenured position.

The February 6, 2015, full-time tenure track philosophy faculty position description read that the minimum qualification was now, "Qualified and willing to teach symbolic logic." Schaefer testified that the wording was changed to allow for a greater pool of applicants. Again, the Examiner finds Schaefer's testimony was credible. The record is deplete of evidence that would belie Schaefer's testimony regarding the position description.

Article III, Section B (2) of the parties' CBA discusses the beginning of the full-time faculty selection process: "A job description and closing date for the position shall be written and recommended by the division chair and appropriate dean. The Dean of Instruction shall submit a written job description to the Vice President of Instruction, who will then submit it to the Office of Human Resources."

The parties' CBA clearly demonstrates that it is a management right to draft and recommend a particular job description in order to hire full-time faculty member. While the CBA allows for full-time faculty input on candidate selection for a full-time faculty position, the actual creation of that position, and ultimate hiring selection for the position, are management rights.[18]

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[18] Article III, Section A of the parties' CBA, Selection of Full-Time Faculty, states:

> Recommendations regarding the selection of faculty applicants shall be made by those administrators and faculty who know the abilities the position requires in order to select the best candidate. Competency in the assigned field and an understanding of the purposes of a comprehensive community college are criteria basic to selection.

The CBA also contemplates that a screening committee comprised of administrators and full-time faculty vet the candidates through application reviews and interviews, and the human resource department reviews for diversity. Article III, Section B (7)(8)(9). While the screening committee makes candidate recommendations of up to four candidates, who is selected for the position is ultimately up to the vice president of instruction and the president. Article III, Section B (11).

While the college maintained a management right as to how the 2015 full-time philosophy position description was drafted, that does not preclude the inquiry as to whether Hoeller was discriminated against based on the college's changes to the full-time position description.

Issue 1(b): No deprivation of an ascertainable right, benefit, or status

Did Hoeller have a "right" to a job description that provided him an opportunity to apply for a full-time faculty position? Arguably, no. There is no "right" that an employer maintain an outdated job description that does not meet its current business needs.

Did Hoeller lose a "benefit" or "status" by the college revising the full-time faculty job description? A full-time faculty position description that matched Hoeller's skills and abilities was not a "benefit" or "status" that Hoeller himself personally attained or held as a result of his employment at the college. While the opportunity to apply for a vacant full-time faculty position was always a possibility for Hoeller given his years and breadth of experience, it was also a *possibility* held by many other college adjuncts, as well as external candidates.

Consequently, by modifying the position description for a tenure-track position in philosophy in 2015, the college did not deprive Hoeller of an ascertainable right, benefit, or status. This allegation fails the second prong of the prima facie analysis.

ISSUE 1(b), Third Prong of the Prima Facie Case: Did the complainant establish a causal connection between the protected activity and the employer's action(s)?

Issue 1(b): No causal connection between the employee's protected activity and the employer's action(s)

If a reviewing body were to determine that Hoeller was deprived of an ascertainable right, benefit, or status by the college's modification of the full-time faculty position description in 2015, the third prong in establishing the prima facie case would be to determine whether a causal connection existed between the employee's protected activity and the alleged employment action(s).

Hoeller filed two grievances between November and December of 2014 regarding class assignments based on the part-time file and the new department policy regarding post-file review, respectively. As the new interim dean, Schaefer began the process for creating the new full-time faculty position

in the philosophy department in mid-January 2015. While the proximity in time between Hoeller's then-most recent protected activity and the employer's decision to change the position description is of note in the causation analysis, there are no other indicators of causation, such as a pattern of anti-union animus or comparator union-engaged employees. *See Mansfield School District*, Decision 5238-A (EDUC, 1996); *Reardan-Edwall School District*, Decision 6205-A.

As such, the Examiner finds that Hoeller did not establish a causal connection between his protected activity and the employer's creation of the 2015 full-time faculty position.

Issue 1(b): Employer's legitimate nondiscriminatory reason

While the Examiner determined that the complainant failed to prove a causal connection, the Examiner does believe the employer's legitimate nondiscriminatory reasoning is worth mentioning. The employer argues the addition of the experience teaching logic requirement to the 2015 full-time tenure position announcement stemmed from the college's Associate in Arts Direct Transfer Agreement (DTA) program.

Fia Eliason-Creek serves as the employer's director of institutional effectiveness and testified to the importance of the popular DTA program for nearly 7,000 students enrolled in the program. Upon successful completion of a minimum of 90 credits of the courses offered in the DTA, students are able to transfer to a four-year college as a junior.

The "Quantitative Skills/Symbolic Reasoning" component of the DTA requires each student to take a five-credit math class or Philosophy 120 (Symbolic Logic). Eliason-Creek testified that symbolic logic is the only nontraditional math class that satisfies the basic math skills requirement. A review of the employer's Associate in Arts DTA, admitted to the record, supports Eliason-Creek's testimony. The DTA lists 22 four-year colleges in Washington state and 5 four-year colleges in other states where students may take 90 quarter credits of DTA courses, attain an average 2.0 cumulative grade point average, and will then be granted junior status. The

Examiner finds Eliason-Creek's testimony, as corroborated by the DTA, credible.[19] The employer met its burden and articulated a legitimate nondiscriminatory reason for amending the full-time philosophy position announcement.

Issue 1(b): Establishing pretext or that the employer was substantially motivated by union animus

To address the complainant's post-hearing brief arguments, the Examiner continues with an analysis of the ultimate element of discrimination: pretext or that the employer was substantially motivated by union animus.

Hoeller attempts to establish pretext with three arguments. First, he points to other philosophy courses that fulfill the DTA agreement. Second, he challenges Eliason-Creek's testimony as she is not a philosophy professor. Third, he argues that the employer only offered into the record faculty position descriptions for four colleges around the country that require logic.

Hoeller's first argument is flawed. The DTA is broken down into a distribution list of eight components: 1. Basic Skills (comprised of Communication Skills and Quantitative Skills subcomponents); 2. Humanities/Fine Arts/English; 3. Social Science; 4. Natural Science; 5. Additional Credits; 6. Lifetime Fitness/Wellness; 7. Diversity; and, 8. Electives. Four of the eight components offer philosophy classes to fulfill the DTA requirements. Quantitative Skills is the only category that allows only one specific philosophy class, Philosophy 120 (Symbolic Logic), to supplant a math course. The other three components that include philosophy classes as options allow students to choose between two and eighteen classes toward the minimum required credits.

Eliason-Creek credibly testified that all 34 Washington state community colleges fall under the same DTA agreement. She further testified that in 2013 there was a change in the requirements

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[19] The college's Associate in Arts Degree DTA, Employer Ex. 19, is dated Summer 2016. Through cross-examination and redirect, Eliason-Creek testified that the changes to the DTA, which involved philosophy faculty from across Washington state, originally occurred in 2013. *See infra* p. 27. The Examiner found Eliason-Creek's testimony regarding the 2013 origination of the symbolic logic component of the DTA credible.

that fulfilled the "Quantitative Skills" subcomponent. Prior to that change, the University of Washington allowed courses in computer science, engineering, physics, and others to count toward that five-credit requirement. In order to meet the University of Washington's new requirements, a joint transfer council was created comprised of four-year universities, community colleges, and the State Board of Education. Per Eliason-Creek, many Washington state community college faculty got together and revised the Philosophy 120 (Symbolic Logic) class pursuant to the new requirements of the University of Washington. Eliason-Creek testified that the University of Washington approved the Philosophy 120 (Symbolic Logic) curriculum devised by the various community college philosophy faculty and that it is now the statewide standard used in the DTA.

Hoeller's second pretext argument, which concerns Eliason-Creek's philosophy expertise, is misplaced. First, Eliason-Creek testified that she holds responsibilities for college data reporting and analysis, program evaluation, curriculum development, and assessment of learning outcomes. Based on her testimony, her position is not specifically designed to evaluate philosophy courses offered by the employer. However, the statewide joint transfer council, and later several community college philosophy faculty, made the decisions and revisions to Philosophy 120 (Symbolic Logic) to meet the new requirements of the "Quantitative Skills" subcomponent. Hoeller did not challenge Eliason-Creek's knowledge of statewide community college transfer programs nor did he challenge the knowledge of the joint transfer council or the group of community college philosophy faculty.

Hoeller's last attempt to establish pretext is arguing that the employer only offered examples of faculty position postings from four community colleges that required logic, only one of which was in Washington state, Everett Community College. Hoeller did not offer evidence that other Washington community colleges do not require logic to fulfill the DTA "Quantitative Skills" subcomponent.

In conclusion, Hoeller failed to establish that the employer's proffered legitimate nondiscriminatory reasons were pretexts or that the employer was substantially motived by union animus. As such, the employer did not discriminate against Hoeller by modifying the philosophy tenure-track position description in 2015, and Issue 1(b) is dismissed.

ISSUE 1(c): Did the employer evaluate Hoeller when he was sick with the flu during fall 2015 academic quarter in reprisal for protected activity?

The employer's post-hearing brief points out that Hoeller did not actually use any leave during the fall 2015 academic quarter and that Hoeller admitted as much at hearing. The employer further argues that Hoeller did not make a "correction" to the initial ruling in the ULP proceeding while at hearing. Finally, argues the employer, Hoeller failed to produce any negative student evaluations at hearing.

Hoeller's original ULP complaint, filed October 29, 2015, alleges he was sick with contagious flu three times during the *winter* 2015 academic quarter and asked that student evaluations be postponed until the following quarter.[20] Hoeller's post-hearing brief calls Issue 1(c) a "clerical error" and describes the "incident" as taking place during the "Winter Quarter of 2015." The brief states, "Hoeller and Re did not catch the error in time for the amended request." Still, Hoeller's brief asserts, "the incident did happen and it does contribute to the pattern of discrimination."

Admitted into evidence was an accounting of Hoeller's compensable sick leave between April 2013 and April 2016. The document reflects Hoeller took six hours of sick leave in January 2015, nine hours of sick leave in February 2015, and twelve hours of sick leave in March 2015.

E-mails admitted to the record between Hoeller and Becker indicated that Becker administered student evaluations in all three of Hoeller's classes on March 13, 2015, while he was absent due to illness.

Chapter 391-45 WAC governs proceedings before the Commission on complaints charging unfair labor practices. Hoeller did not seek to have the January 6, 2016, preliminary ruling clarified to

[20] Hoeller's December 8, 2015, amended complaint further specifies the alleged timeframe the employer conducted student evaluations in his classes as "Winter Quarter 2015 (January–March 2015)," and his request to postpone student evaluations until "Spring Quarter (March–June 2015)."

reflect the correct quarter during which he was ill and the employer conducted student evaluations. *See State – Corrections*, Decision 11571-A (PSRA, 2013); WAC 391-45-110(2)(b).

In addition, Hoeller did not seek to amend his complaint to conform to the pleadings. WAC 391-45-070(2) provides that a complaint may be amended:

- After the appointment of an examiner but prior to the opening of an evidentiary hearing, amendment may be allowed upon motion to the examiner and subject to due process requirements. WAC 391-45-070(2)(b); or
- After the opening of an evidentiary hearing, amendment may only be allowed to conform the pleadings to evidence received without objection, upon motion made prior to the close of the evidentiary hearing. WAC 391-45-070(2)(c).

Issue 1(c): No deprivation of an ascertainable right, benefit, or status

Hoeller could have sought clarification from the Commission on the preliminary ruling[21] or amended his complaint to conform to the pleadings to reflect the winter 2015 academic quarter, rather than the fall 2015 academic quarter. However, even had Hoeller done so, there is insufficient evidence to support that Becker's administration of the student evaluations during the winter 2015 academic quarter caused any deprivation of an ascertainable right, benefit, or status, such as the assignment of (or failure to assign him) classes, a disciplinary action, or otherwise. Finally, Hoeller did not provide any evidence to show that current department practice or policy required an instructor to be present when his or her student evaluations were conducted.

In sum, Hoeller failed to seek clarification from the Commission on the January 6, 2015, preliminary ruling and failed to amend his complaint to conform to the pleadings. In other words, once the evidence at hearing revealed that the administration of student evaluations actually occurred during the winter 2015 academic quarter, Hoeller could have made a motion to amend the complaint as provided for under WAC 391-45-070. However, even if Hoeller had amended his complaint, no evidence was presented to show that any malfeasance or harm resulted from the

[21] *See* WAC 391-45-110(2)(b).

employer administering the student evaluations during his absence. The record does not establish that Becker was substantially motivated, or even remotely motivated, by union animus. The totality of the evidence did not support findings that the college's choice to conduct student evaluations when Hoeller was absent due to illness had any impact whatsoever on his employment at the college.

The complainant failed to establish that administering student evaluations of Hoeller's classes during the fall 2015 academic quarter, or even the winter 2015 academic quarter, resulted in any tangible employment action by the college or was a result of discrimination against Hoeller for protected activities. The Examiner finds Hoeller failed to prove the second prong of the prima facie case in that he was not deprived of any ascertainable right, benefit, or status. As Hoeller was not deprived of a right, benefit, or status, no further analysis as to causation is required. Hoeller did not establish the prima facie case for Issue 1(c), so that issue is also dismissed.

ISSUE 1(d): Did the employer fail to offer teaching assignments to Hoeller for the summer 2015 academic quarter in reprisal for protected activity?

Hoeller alleges that since he was the senior adjunct instructor in the part-time file for all of the available philosophy classes, except logic, he should have been given his choice of courses after the tenured faculty claimed theirs. Hoeller argues that classes were given to more junior adjuncts before Hoeller was notified of their availability and that he was given no classes for the summer 2015 academic quarter.

The employer's brief argues that the CBA's Article IV, Section E controls the assignment of courses to full-time faculty before part-time faculty. Allowing full-time faculty to select courses first simply complies with the CBA and is not a discriminatory action, the employer argues.

Article IV, Section E of the CBA reads, in pertinent part, as follows:

> PART-TIME CLASSES TAUGHT BY FULL-TIME FACULTY
>
> All full-time faculty members shall have the right of first refusal to teach classes in their regularly assigned instructional area (discipline) outside of the seven (7) hour assignment span as assigned by the appropriate administrator in any academic

> quarter, including summer, provided a written request is submitted five (5) weeks prior to the beginning of the class offering.

Article IV, Section G provides for summer school appointments of full-time faculty: "Course offerings and appointments of summer faculty will be given prior to May 15. Exceptions to this policy will be made by the appropriate administrator(s) after consultation with the division chairperson and the division faculty member."

The adjunct faculty employment file, also commonly described as the "part-time file," is addressed in Article V, Section P of the CBA. Article V, Section P (4)(g) addresses how an adjunct faculty member is initially placed in the file, which is forwarded to the department dean after an evaluation process. Once placed in the part-time file, adjunct faculty may be removed

> a. upon the request of the adjunct faculty member, or
>
> b. when the adjunct faculty member fails to accept three (3) consecutive contract offers, or
>
> c. when the adjunct faculty member is not employed for three consecutive quarters (excluding summer), or
>
> d. when the adjunct faculty member is terminated for cause . . . .[22]

Adjunct faculty may be terminated for cause upon recommendation from the division or appropriate administrator based on documented evidence.[23]

As previously noted, the criteria for the assignment of classes to adjunct faculty is also addressed in Article V, Section P (8)(a) in the parties' CBA.[24] Article V, Section P also provides a non-exhaustive list of examples of when an adjunct faculty member's quarterly contract may be cancelled if his or her services are not needed. Such examples include when a contracted class

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[22] CBA, Article V, Section P (5).

[23] CBA, Article V, Section P (11). This provision also indicates that adjunct faculty members are not afforded tenure rights or privileges.

[24] *See supra* Issue 1(a) p. 11.

has insufficient enrollment, when contracted classes are needed to make a full load for a tenured faculty member, or when a program is reduced during the period of the contract.[25]

Issue 1(d): No deprivation of an ascertainable right, benefit, or status

On November 12, 2014, Hoeller filed a grievance alleging unfair and unequal department class assignments to adjunct faculty. He alleged the philosophy department schedule was being manipulated to deny him classes and give them to adjuncts with less seniority.

On May 21, 2015, Hoeller e-mailed Barnes and Johanson to inquire when the philosophy department's summer quarter class assignment would occur. Hoeller referenced that he had "long taught two classes every summer quarter, usually PHIL 101 (Introduction) at 9 a.m. and either PHIL 102 (Contemporary Moral Problems) or PHIL 115 (Critical Thinking) at 10:40 a.m." Hoeller's e-mail also noted that the "only classes at 10:40 a.m. [were] PHIL 120 (Logic), which [he did] not teach, and PHIL 240 (Ethics), which Ty [Barnes] [had] taken."

Hoeller's May 21, 2015, e-mail also contained a postscript recognizing that there was an option for him to teach an online class of Philosophy 112 (Ethics in the Workplace) as he was "first in the part-time file for it," but that it was "entirely online and would require [his] developing the class from scratch."

Hoeller was not deprived of an ascertainable right, benefit, or status when he was not assigned classes during the summer 2015 academic quarter. An adjunct does not have a "right" to be assigned to classes during any quarter per the parties' CBA. Once the full-time faculty exercise their right of first refusal in class selection, an adjunct, such as Hoeller who has established himself in the part-time file, *may* be assigned classes. The "benefit" of being senior in the part-time file or the "status" of being senior in the part-time file *still* does not afford an adjunct faculty member an absolute assignment of a certain amount of classes per quarter; nor does it afford an adjunct faculty member classes during a specific time of day or modality (online, hybrid, or in-class) assignment.

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[25] CBA, Article V, Section P (10).

As Hoeller failed to establish that he was deprived of any ascertainable right, benefit, or status by not being assigned classes by the college for the summer 2015 academic quarter, this allegation fails the second prong of the prima facie case and is dismissed.

Issue 1(d): Causal connection between the employee's protected activity and the employer's action

Should a reviewing body determine that Hoeller was deprived of an ascertainable right, benefit, or status, the Examiner continues with an analysis of causal connection. Hoeller engaged in protected activity in proximity to late spring 2015 when he discovered the employer failed to assign him any summer courses for the summer 2015 academic quarter. On December 1, 2014, Hoeller filed a grievance regarding the new humanities division policy. On March 3, 2015, Hoeller wrote to Becker and objected to Scott, Barnes, and Johanson conducting class observations. And in mid-March, Hoeller and Becker exchanged several e-mails about her administering student evaluations.

Hoeller's protected activity detailed above occurred several months prior to him not receiving any class assignments during the summer 2015 academic quarter. However, proximity alone in this case is insufficient to establish a causal connection between the employee's protected activities and the employer's action or inaction. Again, other than the temporal proximity in this instance, there are no other indicators of causation, such as comparator employees. *See Reardan-Edwall School District*, Decision 6205-A.

Hoeller did not establish a causal connection between his protected activity and the employer's actions and, therefore, failed to prove the third prong of the prima facie test for discrimination.

Issue 1(d): Employer's legitimate nondiscriminatory reason

If a reviewing body determined that Hoeller did establish a causal connection, the Examiner continues with an analysis of the employer's offered legitimate nondiscriminatory reason. The employer argues that Hoeller already availed himself of the grievance process under the CBA for this particular dispute and that the process determined his classes were assigned in compliance with the CBA. Thus, the employer argues this complaint "should be denied because the grievance

process already determined the College did not fail to offer teaching assignments to Dr. Hoeller for the Summer 2015 Academic Quarter."

In essence, the employer is asking the Commission to defer the statutory right of Hoeller to file a ULP complaint under Chapter 28B.52 RCW to the grievance arbitration processes that have already taken place in the long history of this case. There is a clear distinction between the statutory protections under Chapter 28B.52 RCW (as well as other statutes the Commission has jurisdiction over) and contractual grievance proceedings governed by parties' collective bargaining agreements. The Commission takes a conservative approach, limiting deferral of a ULP complaint to an arbitrator's interpretation of the labor agreement only where the employer's conduct at issue is alleged as a "unilateral change" case. *City of Bremerton*, Decision 6006-A (PECB, 1998), *citing City of Yakima*, Decision 3564-A (PECB, 1991).

As noted by the Commission:

> Arbitrators have no particular expertise in other issues, and the Commission does not defer any "representation," "unit determination," "interference," "domination," or "discrimination" allegations . . . . Such matters are not susceptible to resolution through contractual grievance proceedings.

City of Bremerton, Decision 6006-A, *citing Port of Seattle*, Decision 3294-B (PECB, 1992).

As full-time faculty have the right of first refusal on class assignments, the employer argues that "the College does not view allowing full-time instructors to choose their classes first as being retaliatory to adjuncts since the CBA requires it." The employer highlights that adjunct faculty in the part-time file, per the CBA, only have priority to teach classes that are "available."

On June 8, 2015, Re, as Hoeller's representative, filed an emergency grievance regarding the failure of the college to assign Hoeller two classes during summer quarter. On June 17, 2015, Brandes denied the grievance at Step 1. Brandes explained in the step response that the employer cancelled Philosophy 102 (Contemp Moral Problems) in both summers of 2014 and 2015 as it was the lowest enrolled philosophy class in 2014. The employer offered Philosophy 115 (Critical Thinking) in summer 2014, but the enrollment was only at 12 students, or 43 percent capacity. Brandes

explained further in the grievance response that he asked "Dean's [sic] to have class make figures in the 15 to 17 student range." Finally, Brandes explained that even if Philosophy 101 (Intro to Philosophy) were offered that summer, full-time faculty would have had the right of first refusal.

On June 25, 2015, Re appealed Brandes' Step 1 response to Dr. Eileen Ely, then president of the college. Ely issued a Step 2 response on July 1, 2015, affirming the denial of Hoeller's grievance and explaining, "Last summer we started with nine philosophy classes and cancelled three of them due to low enrollment. This summer we started with seven philosophy classes and cancelled three due to low enrollments." Ely further explained that Philosophy 102 (Contemp Moral Problems) was cancelled the previous summer and cancelled for summer 2015 due to low enrollment. She explained that Philosophy 115 (Critical Thinking) was not listed for summer 2015 because it was only at 43 percent capacity the previous summer.

Ely's Step 2 response also cited Article IV, Section G of the CBA, indicating that while Hoeller's grievance accurately pointed out the May 15 deadline for appointments of faculty for summer classes, the same provision also allowed for exceptions to the policy as made by an administrator. Further, Ely cited Brandes' Step 1 response regarding Philosophy 112 (Ethics in the Workplace) as an online course offering for that summer; the assigned instructor had taught Philosophy 112 (Ethics in the Workplace) online 21 times. Hoeller had taught Philosophy 112 (Ethics in the Workplace) seven times, none of which were online. Both Ely and Brandes relied on Article V, Section P (8)(a) and cited "other relevant factors" as well as Hoeller's May 21, 2015, e-mail about having to develop an online class from scratch as reasons why Hoeller was not offered Philosophy 112 (Ethics in the Workplace).

The employer's brief asserts that for summer quarter 2015 the college was facing a three million dollar budget shortfall, summer enrollments were low, and the college had to fully eliminate two instructional programs to save money. The employer claims that due to the small number of philosophy classes offered during the summer 2015 academic quarter, there were no available classes to offer Hoeller.

The employer relies on Re's testimony on cross-examination when Re was asked if she thought it was unreasonable for Barnes to look at Hoeller's May 21, 2015, postscript and conclude that

Hoeller was not interested in teaching Philosophy 112 (Ethics in the Workplace). "Oh. I believe it was probably reasonable to assume [Hoeller] wasn't extremely interested in that course." Earlier on cross-examination, however, Re testified regarding the postscript, "I'm not sure that that is saying 'I'm not interested.' I think it's saying that, 'I'm not prepared at this time to do the extra work,' or that, 'If you need me, I'll do it.' I don't know. I don't know what he was thinking."

On redirect examination, Hoeller asked Re:

Q: Did I turn it down?

A: No.

Q: Did I say it was difficult to do, not my first preference?

A: No, didn't say it was -- doesn't say you turned it down, no.

Hoeller did not explicitly turn down Philosophy 112 (Ethics in the Workplace), but he also did not explicitly state in his e-mail, or otherwise, that he wanted to teach Philosophy 112 (Ethics in the Workplace), even if he did have to start "from scratch." The employer articulated a legitimate nondiscriminatory reason why Hoeller was not assigned classes for the summer 2015 academic quarter.

<u>Issue 1(d): Complainant's proof of pretext or that the employer was substantially motivated by union animus</u>

To establish pretext, Hoeller's brief argues that as the most senior adjunct, he should have "been given his choice of courses after the tenured faculty claimed theirs." Second, the brief alleges that classes were given to junior adjuncts before Hoeller was notified of their availability. Third, Hoeller's brief argues that he was given no classes in the summer 2015 academic quarter, despite his classes nearly always filling (with student enrollments).

In February 2014, Johanson e-mailed the philosophy department's faculty to advise that the department was thinking of changing the process by which philosophy classes were scheduled. (This process is hereafter referred to as the preference policy). John Fox, an adjunct faculty

member, and Hoeller were "tied" for seniority. Since Fox was planning to retire in June 2014, this proposed new process, per Hoeller, would have effectively denied Hoeller his seniority.

The proposed new process was eventually implemented as policy in April 2014. The process asked adjuncts to list their "preferences" for which classes they wanted to teach (and, of those, which they were in the part-time file for); how many classes they preferred to teach; which class times they preferred; and if they were willing to teach at the employer's Kent campus. In response to the February 2014 e-mail inquiry, four of the eight adjunct faculty provided several reasons why they disagreed with the proposed new class scheduling process.

Article IV, Section G of the CBA establishes, "Summer school faculty appointments and course offerings shall be developed by the division members and the appropriate administrator(s)." This section further states, "The division faculty members shall be responsible for rotating summer school appointments on an annual basis whenever possible or necessary among qualified *full-time faculty members* who have made written application by April 1." (emphasis added).

In an April 21, 2014, e-mail announcing that the new preference policy was going to be implemented in the philosophy department, Johanson wrote, "Since I did not receive any negative feedback, we are going to move ahead with this experiment." This statement was contrary to the four e-mails sent from adjunct faculty who provided negative feedback to Johanson's February 2014 e-mail.

Johanson's e-mail detailed that upon collecting and compiling all of the instructors' preferences, the adjuncts would meet separately from Barnes and Johanson (the tenured faculty) and create proposed class assignments for the fall. Johanson ended the e-mail with:

> What we hope will occur through this process is that seniority and qualifications for teaching a course are prioritized, but also consideration given *to giving less senior members of the department a chance to teach courses for which they are qualified."* (emphasis added).

Admitted as evidence were e-mails to Johanson and Barnes indicating that four of the eight adjuncts did, in fact, weigh in *against* this new process. Fox's response to department faculty on February 28, 2014, stated:

> My hope would be that, seniority or not, [classes] would be filled equitably by this present faculty.
>
> Further, and this is merely a wish, I would like it if the present animosities which center on Keith -- justifiably or not --
>
> be disregarded when it comes to allocating jobs. No doubt he has antagonized some of you by his political activities,
>
> activities which would irritate anyone, but it would be petty to use rationalizations about 'improving the department' to
>
> adopt policies which remove our local gadfly -- or even impinge on his income.

While Fox's e-mail could be construed as supportive of Hoeller, he also wrote:

> And Keith [Hoeller], I stand by
>
> my assertion that you owe Andrew an apology -- a heartfelt, earnest apology. Whats [sic] more, if you can't see your way
>
> to doing this, then you are simply opting for this absurd status quo of phony collegiality and don't deserve the concern[.]
>
> I am voicing here for your career. What? You say you are not guilty of anything? Grow a pair and apologize anyway.....
>
> Take responsibility for the offenses people feel you have committed. This will require courage and grace. Are you up
>
> to it?

The Commission considered whether a change in department practices to an hourly threshold had a discriminatory effect on the employees in *Port of Seattle (International Longshoremen's and Warehousemen's Union, Local 9)*, Decision 3065-A (PECB, 1989). The record lacked probative evidence showing whether the respondent union's alleged preferential treatment resulted in diminished work opportunities for the complainant.

The philosophy department's new class assignment preference policy was implemented just as Hoeller became the most senior adjunct. Johanson's April 21, 2014, e-mail stated the intent of the new preference policy was to allow less senior adjunct faculty opportunities to teach classes. Despite the questionable timing and intent, like *Port of Seattle*, there is insufficient evidence to establish that the *policy itself* led the employer to not assign Hoeller classes in the summer or fall of 2015.[26, 27] *Id.*

While the timing of the change in department policy upon Fox's retirement appears suspect, the burden of persuasion to establish pretext or that the employer was substantially motivated by Hoeller's protected activity rests with the complainant. *City of Vancouver v. Public Employment Relations Commission*, 180 Wn. App. at 349. The record lacks probative evidence showing that the 2014 change in the departmental class scheduling process was caused by Hoeller's union activity or substantially motivated by union animus.

For the summer 2015 academic quarter, seven philosophy classes were offered and three classes—one section of Philosophy 240 (Introduction to Ethics) and two sections of Philosophy 120 (Symbolic Logic)—were cancelled. Hoeller did not request to teach Philosophy 240 (Introduction to Ethics) and he already established that he did not teach Philosophy 120 (Symbolic Logic). Of the remaining four summer 2015 academic quarter philosophy classes, Barnes taught Philosophy 101 (Intro to Philosophy) and Philosophy 120 (Symbolic Logic); Will, an adjunct, taught Philosophy 112 (Ethics in the Workplace); and, Jeffery, an adjunct, taught the other Philosophy 120 (Symbolic Logic) class.

As a full-time faculty member, Barnes had the right of first refusal to teach as many classes as the CBA allowed for summer quarter. Philosophy 112 (Ethics in the Workplace) was only being

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[26] *See infra* Issue 1(e) p. 40.

[27] While this Commission permits complainants appearing pro se some leniency with regard to the presentation of their case, the rights of the other parties to the proceeding must also be considered, and pro se complainants still have the ultimate burden of proving their complaint. *Community College District 13 (Lower Columbia)*, Decision 9171-A (PSRA, 2007). *See also Port of Seattle (ILWU Local 9)*, Decision 3065-A (showing that the Commission blessed the Examiner's approach to allowing a pro se complainant to pursue evidence where relevancy was not readily apparent, but cautioned that "the decision can rest only upon the evidence actually in the record. RCW 34.04.090(7); RCW 34.05.461(4). With respect to the evaluation of the evidence, no greater consideration can be given to a pro se litigant than to a party represented by experienced counsel."

offered to students online—Hoeller had never taught a class online. The instructor who taught Philosophy 112 (Ethics in the Workplace) online, Will, had taught in that modality over twenty times. Hoeller did not teach logic, the only other remaining class being offered in summer 2015 academic quarter. The humanities division determined which classes and how many will be offered per the CBA.

The record lacks probative evidence that the 2014 department policy led to the employer's failure to assign Hoeller classes in the summer 2015 academic quarter. Similarly, Hoeller failed to establish that the employer's stated reasons were pretexts or that the employer was substantially motivated by union animus in failing to assign him classes.

For failing to establish a prima facie case or, in the alternative, that the employer's proffered legitimate nondiscriminatory reason was pretext or was substantially motivated by union animus, there is insufficient evidence to establish that the employer discriminated against Hoeller regarding Issue 1(d) and, therefore, that allegation is dismissed.

ISSUE 1(e): Did the employer modify the course offering schedule to deny Hoeller an opportunity to teach more than two courses during the fall 2015 academic quarter?

Hoeller argues that until spring 2014, class assignments to adjunct faculty were assigned by seniority in a meeting of all the adjuncts. Hoeller's brief relies on his own testimony as well as that of Jeff Clausen. Clausen taught in the philosophy department from 1971 to 1981 as an adjunct, from 1981 to approximately 1991 as the only full-time instructor and "head of the department," and then shared the department responsibilities with another full-time instructor until 2006. Hoeller and Clausen testified that the most senior adjuncts chose classes followed by the next senior member until all classes were assigned. Hoeller's brief states that when the department's tenured faculty changed the process "again" to allow the adjuncts to meet alone and decide among themselves, the result was "mostly by seniority." Finally, he points to an "agreement" about sharing Philosophy 160 (Intro to Philosophy of Science) and Philosophy 114 (Philosophy of Law). The agreement was followed for a short time, until, according to Hoeller, "the tenured faculty violated the agreements."

Hoeller's brief states that he was offered two philosophy courses for the fall 2015 academic quarter, one at noon and one at 1:00 p.m. He turned down a third offering, Philosophy 101 (Intro to Philosophy), because the course was to be offered at night. Hoeller testified he had not taught at night for decades due to commute time and wanting to be home with his wife. Finally, Hoeller argues that since the original ULP complaint was filed on October 29, 2015, the employer's failure to offer him an opportunity to teach more than two courses during the fall 2015 academic quarter was also in retaliation for him filing the ULP complaint with the Commission.

The employer argues that "[t]his fifth ULP claim is also a CBA dispute that Dr. Hoeller already grieved."[28] Further, referring to the grievance response, the employer added additional reasons for Hoeller not teaching more than two classes in fall 2015: class cancellations were justified by low enrollments, one of the classes that Hoeller wanted was properly assigned to a full-time faculty member, and Hoeller declined the third class offered to him. The employer highlights that 8 out of 25 philosophy classes were cancelled in the fall 2015 academic quarter, and 296 (out of 1,185 offered) were cancelled college-wide. By comparison, 168 out of 1,761 classes offered college-wide and 7 out of 25 philosophy classes were cancelled for the fall 2014 academic quarter.

Clausen's testimony regarding the past process of class assignments is inconclusive and relevant only as background evidence. Clausen confirmed that during his time at the college, he recalled classes were assigned by seniority. He also testified to the part-time file, where an adjunct's seniority would begin to count once they successfully completed the evaluation process.

When asked how frequently the department met to schedule classes, Clausen answered, "We met quarterly, if I recall, quarterly." Next, he said, "I think we did also set -- also set out an annual schedule, or . . . of classes, not necessarily names."

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[28] *See supra City of Bremerton*, Decision 6006-A, pp. 34–35.

Hoeller's brief references an "agreement" regarding Philosophy 160 (Intro to Philosophy of Science) and Philosophy 114 (Philosophy of Law).[29] He also references the May 21, 2014, e-mail from Rebeka Ferreira to Barnes and Johanson detailing the comments and recommendations made at an adjunct meeting regarding the 2014 fall schedule and a few future quarters. The "agreement" reached for Philosophy 160 (Intro to Philosophy of Science) is listed as follows:

> Keith, Anthony, and Ty will trade off, each taking it once a year when it is offered three times a year. Fall 2014 – Keith [Hoeller], Winter 2015 – Anthony [Ferrucci], Spring 2015 – Ty [Barnes].

The record reflects that Hoeller taught Philosophy 160 (Intro to Philosophy of Science) in fall 2014. The record lacks evidence as to whom taught the course in winter 2015, but Ferrucci taught it in spring 2015. In fall 2015, Barnes taught the class, not Hoeller. On June 11, 2015, Barnes e-mailed Hoeller about available classes for the fall:

> I received your teaching preferences for Fall Quarter and was able to give you the two classes you asked for: 101 at noon and 115 at 1PM. (Phil 160 is not available to you since a full-time faculty member is teaching it.)
>
> Since you normally teach three classes in the Fall, I was wondering if you'd like to teach the 7:15PM 101 class? It's still available and it's yours if you want it.
>
> Let me know what you think.

On June 12, 2015, Hoeller replied to Barnes about the class and reminded him of the agreement. Hoeller also "passed" on teaching the Philosophy 101 (Intro to Philosophy) evening class. Barnes replied on June 18, 2015, "Due to significant staffing and scheduling changes, we've had to make adjustments to the 2015–2016 schedule. As a result, the PHIL 160 is not available this fall."

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[29] Philosophy 114 (Philosophy of Law) does not appear to be at issue in this allegation. However, to be clear for the record, the same document that contains the adjuncts' "Recommendations" for fall 2014 class assignments also contains a category of "Courses that instructors would like to see on future schedules." Philosophy 114 (Philosophy of Law) is one of those classes. The summation reads, "Keith would like to see Philosophy of Law on the schedule. Most agreed that with sufficient effort, enough interest and enrollment could be generated." The Examiner does not find that this equates to an "agreement." Rather, this is an aspirational goal that department adjunct faculty agreed with and submitted to Johanson and Barnes, as the department leads, for making class assignments.

On July 9, 2015, Re filed a grievance regarding the fall class assignments on behalf of Hoeller. Upon appeal and consideration of Brandes' Step 1 response, Dr. Ely asserted in her August 6, 2015, Step 2 response:

> Dr. Hoeller was assigned two of his three preferred classes, and his third choice was assigned to a full-time instructor. Dr. Hoeller was offered an alternate third philosophy class that he declined because he did not want to teach an evening course. Based on the class assignment process and the current enrollment climate, Dr. Hoeller simply may not always be assigned the exact courses at the precise schedule that is his first choice.

Regarding the "agreement" about Philosophy 160 (Intro to Philosophy of Science), Ely pointed out that the "agreement" fell under the broad category of "Recommendations" made by the adjunct faculty. Further, Ely argued that the three quarter rotation of Philosophy 160 (Intro to Philosophy of Science) was not meant to be in perpetuity and that it only mentioned the three specific quarters: fall, winter, and spring, during the 2014–2015 academic year. Finally, Ely argued that other changes had occurred since the "agreement," including a full-time faculty retirement (Johanson), Ferreira being hired full-time, and Ferruci not teaching in the fall. Those changes warranted the application of the CBA to the class assignments, according to Ely.

Issue 1(e): No deprivation of an ascertainable right, benefit, or status

Hoeller argues that the philosophy department "agreement" should have continued into the 2015–2016 academic year so that he would have been assigned the fall 2015 Philosophy 160 (Intro to Philosophy of Science) class. The "agreement" only contemplated the adjuncts' recommendations for the 2014–2015 academic year, not in perpetuity. By Hoeller's own admission, the new "preference scheduling" process implemented in 2014 started on an annual basis.

If the 2014 class assignment process did not continue into 2015–2016, the guiding principle is the CBA. Under the CBA, full-time faculty do have the right of first refusal for class assignments. Article V, Section P (11) of the parties' CBA states, "Nothing herein shall be construed to confer tenure rights and privileges to adjunct faculty members." As a full-time faculty member, Barnes had the right of first refusal for the fall 2015 Philosophy 160 (Intro to Philosophy of Science) class. Nonetheless, to attempt to accommodate his usual load of three classes, the college offered Hoeller

a third class. The evening class time did not suit his personal preferences, however, and he declined. The allegation is that the employer modified the course offering schedule *to deny Hoeller an opportunity to teach more than two courses during the fall 2015 academic quarter.* Hoeller was offered two classes for fall 2015, which he accepted. He declined the third class he was offered, which was scheduled for the evening. Hoeller was not denied the opportunity to teach more than two courses during the fall 2015 academic quarter. The employer did not deprive Hoeller of a right, benefit, or status in this instance.

As Hoeller was not deprived of a right, benefit, or status, no further analysis as to causation is required. Hoeller did not establish the prima facie case for Issue 1(e).

ISSUES 2(a) and 2(b): Did the employer discriminate against Hoeller in reprisal for filing a ULP complaint by failing to offer Hoeller teaching assignments for the summer 2016 academic quarter or more than two classes for the fall 2016 academic quarter?

Background for Issues 2(a), 2(b), and 2(c):

Hoeller filed a second amended complaint on January 2, 2018, alleging employer discrimination, harassment, and reprisal for filing the October 29, 2015, ULP complaint. The statute of limitations at that time would allow for any occurrence on or after January 2, 2016.[30] The amended preliminary ruling issued by the Examiner addressing Issues 2(a), 2(b), and 2(c) prefaced each of these three allegations with whether the employer discriminated against Hoeller for filing a ULP complaint. The discrimination application of legal standards analysis is the same as applied in Issues 1(a) through 1(e).

Hoeller began teaching courses at Highline College in Des Moines, Washington, in the fall 2015 academic quarter. He also taught two classes at Green River College during the same quarter. On December 15, 2015, Hoeller e-mailed Barnes, Becker, Freitas, and Schaefer declining to teach at Green River College during the winter 2016 academic quarter. Hoeller's e-mail advised he

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[30] *See supra* note 3.

would be teaching at Green River College in the spring 2016 academic quarter and asked to be kept informed about the spring quarter via his personal e-mail account.[31]

On September 8, 2016, Hoeller sent Morgan, the college's president, a letter which began,

> Although I have taught about two hundred courses at Green River College since 1991, was the College's first adjunct to receive the Distinguished Faculty Award in 2012, and am now scheduled to teach three philosophy courses this Fall Quarter 2016, I feel I have no choice but to decline this Fall Quarter teaching assignment. I am taking this action as a direct result of the continuing pattern of harassment I have been subjected to by Green River College, which has created and perpetuated a hostile work environment.

For Issues 2(a) and 2(b), Hoeller argues that because he was not teaching at Green River College during the winter 2016 academic quarter, he did not receive e-mail notification from the department regarding summer or fall 2016 class scheduling. Hoeller claims that he asked the administration to use his off-campus e-mail address to advise him of spring 2016 academic quarter classes before he left to teach at Highline. Hoeller asserts that using off-campus e-mail to contact adjuncts had been the practice for many years.

For Issue 2(b), Hoeller argues that, again, he did not receive the department e-mail asking for class preferences for the fall 2016 academic quarter. He asserts that the e-mail should have been sent to his off-campus e-mail. Further, he asserts the department denied him the assignment of classes by relying on the "other relevant factors" provision of Article V, Section P (8)(a) of the CBA. In particular, the department planned to deliver one of Hoeller's preferred classes as a hybrid (both in-class and online) and another adjunct with less seniority in the part-time file had taught it as a hybrid more often.

As previously noted, by filing the original and amended 2015 ULP complaints, Hoeller established the first prong of the prima facie case for Issues 2(a), 2(b), and 2(c).

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[31] The Humanities Division 2013 By-Laws, Policies, and Procedures, Section II.I.2.b addresses teaching assignments for adjunct faculty and allows an adjunct to notify the division chair or full-time department members of an alternate means of contact in an emergency or other "unusual circumstance."

Issue 2(a): No deprivation of an ascertainable right, benefit, or status

The employer's brief points to Hoeller's testimony wherein he admitted that full-time faculty have the right of first refusal. The employer's brief does not address the employer's lack of notice to Hoeller via his off-campus e-mail regarding class scheduling for the summer or fall 2016 academic quarters.[32]

As for Issue 2(b), the employer's brief argues that Hoeller chose to teach at Highline College in the fall 2016 academic quarter. Further, it argues that Hoeller admitted at hearing that the employer offered him three classes for that same period. Finally, the employer points to Hoeller's September 8, 2016, letter to the college president, wherein he stated that although he was scheduled to teach three classes for the 2016 fall academic quarter, "I feel I have no choice but to decline this Fall Quarter teaching assignment."

Hoeller's brief argues that despite his December 15, 2015, and April 15, 2016, requests to be contacted about summer and fall 2016 academic quarter class assignments at his personal e-mail address, the college chose to use only campus mail to make class offers. By his December 15, 2015, e-mail to the college, Hoeller declined to teach for the employer during the winter 2016 academic quarter.

A February 9, 2016, e-mail from Schaefer to Hoeller's personal e-mail account contradicts Hoeller's assertions. In the February 9 e-mail, Schaefer advised Hoeller that "[a]s a courtesy since [he was] not teaching at GRC [that] quarter," she was e-mailing him at his personal e-mail so he could turn in his "preference form" for the spring schedule to Barnes by February 12, 2016.

On February 12, 2016, Hoeller replied to Barnes regarding the spring 2016 academic quarter,

> It is very late in the process. Spring Registration has already started, and there are very few courses I can teach due to scheduling conflicts with another college who

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32 Interestingly, in Johanson and Barnes March 11, 2013, updated complaint against Hoeller, they wrote:

> [O]n Wednesday, July 18, of 2012, I emailed Keith *at both of the addresses we have on file for him* to meet with us to discuss informally the substance of our complaint. (emphasis added).

> confirmed my teaching schedule months ago. So I will not be teaching at Green River College this Spring, for the second quarter in a row.

On April 15, 2016, Hoeller e-mailed Barnes and Ferreira to inquire about summer 2016 academic potential class assignments. He advised them that though he had requested to be kept informed via his personal e-mail, he had not heard anything from the college since February 2016. Barnes responded that same day and shared an e-mail from earlier in the week of the department requesting class preferences from instructors. Barnes advised Hoeller to check his college e-mail and allowed Hoeller an additional week, until April 22, 2016, to reply with his preferences for fall 2016 academic quarter.

On April 19, 2016, Hoeller replied to Barnes and courtesy copied several administrators, including Becker. He again requested class schedules for both summer and fall 2016 academic quarters. Becker replied to Hoeller later that morning: "You can surmise that if you haven't been contacted regarding summer quarter offerings, you are not being offered summer classes."

A review of the philosophy classes offered to students by the college for summer 2016 academic quarter reveals that seven classes were initially offered, with one section of Philosophy 120 (Symbolic Logic) cancelled. Of the remaining six classes, five were taught by full-time faculty Barnes and Ferreira, and the sixth was a Philosophy 120 (Symbolic Logic) class taught by Jeffery. Again, Jeffery was part-time faculty, and Hoeller did not teach Philosophy 120 (Symbolic Logic).

Hoeller was not deprived of an ascertainable right, benefit, or status by not being offered classes during the summer 2016 academic quarter. The parties' CBA does not afford an adjunct the "right" to be assigned to classes during any quarter. Once the full-time faculty exercise their right of first refusal in class selection, an adjunct such as Hoeller, who had established himself in the part-time file, *may* be assigned classes. The "benefit" of being senior in the part-time file or the "status" of being senior in the part-time file *still* does not afford an adjunct faculty member an absolute assignment of a certain amount of classes per quarter, nor does it afford an adjunct faculty member class assignments during a specific time of day or within a specific modality (online, hybrid, or in-class).

As Hoeller failed to establish that he was deprived of any ascertainable right, benefit, or status by not being assigned classes by the college for the summer 2016 academic quarter, Issue 2(a) fails the second prong of the prima facie case and is dismissed.

As for Issue 2(b), Hoeller was not deprived of an ascertainable right, benefit, or status based on his allegation that the employer failed to offer him teaching assignments for fall 2016 academic quarter. By his own admission, the employer offered Hoeller three classes for that same period and he declined them. As such, Issue 2(b) fails the second prong of the prima facie case and is dismissed.

ISSUE 2(c): Did the employer discriminate against Hoeller in reprisal for filing a ULP complaint by reducing the number and types of courses normally taught by Dr. Hoeller, thereby causing him to be constructively discharged on September 8, 2016?

Hoeller argues that he was denied fair evaluations, denied the ability to teach courses for which he was the most senior adjunct in the part-time file, and denied class assignments by the employer's manipulation of schedules and its change in teaching modalities. For the latter, he claims the employer relied on the CBA's provision of "other relevant factors" to determine which adjunct faculty member would be assigned.

Hoeller's post-hearing brief asserts the following:

> After being denied fair evaluations, denied the ability to teach courses for which [Hoeller] was senior in the file or the only adjunct in the file, denied classes by the manipulation of schedules and changing modalities to use the "other relevant factors" phrase, and the respect that any adjunct with over 25 years of service should have . . . .

Hoeller felt forced to submit the September 8, 2016, letter to Scott Morgan. That letter, he avers, constituted a "constructive discharge." Hoeller alleges he was forced to retire at the end of 2016 due to his reduction of income between 2014 and 2016.

The employer argues that Hoeller's September 8, 2016, letter to the college was not a constructive discharge but, rather, Dr. Hoeller's notification that he was declining the three classes that the college assigned to him for the fall 2016 academic quarter. Further, the employer argues that any

hostility Hoeller may have allegedly received was from the union and fellow faculty. The employer also argues that Hoeller taught two classes and declined a third in fall 2015 academic quarter, that Hoeller declined to teach in the winter 2016 academic quarter, and Hoeller did not request any classes for the spring 2016 academic quarter. Despite being offered three classes in fall 2016 academic quarter, argues the employer, Hoeller decided to teach at Highline College. Finally, the employer relies on Hoeller's completion of the college's "Termination of Employment" form submitted by Hoeller on December 29, 2016. Specifically, that Hoeller checked and initialed the box marked "Retirement" as the reason for termination.

The Commission has issued limited constructive discharge decisions. An early case, *Okanogan Public Hospital District*, Decision 5809-A (PECB, 1997), opined that wrongful termination was not within the Commission's jurisdiction on which to make findings. According to the Commission, whether the employee's resignation was considered a constructive discharge did not affect the issue of whether an unfair labor practice occurred. However, the Commission did find that the employee's resignation was a direct result of the employer's discrimination against her for the protected activity of contacting the Commission and ordered immediate and full reinstatement of the employee. *Okanogan Public Hospital District*, Decision 5809-A.

Another Commission decision took a different approach by addressing the constructive discharge head on. The Commission reviewed corroborating testimony that occurred prior to the statute of limitations regarding the superintendent's comments to the employee that he would "break her in order to break the union." The Commission affirmed the Examiner's ruling that the employer deprived the employee of a right, benefit, or status by issuing an involuntary transfer to a teaching assignment for which she had no teaching experience. *Mansfield School District*, Decision 5238-A (EDUC, 1996). The involuntary transfer occurred after the employee testified at an earlier ULP hearing before the Commission, and after she and her husband (a fellow teacher) filed a separate ULP complaint. The employer had also terminated her husband's employment. The employer failed to renew her husband's contract as the sole teacher of the district's vocational-agricultural program. The district was located in a small, rural area, and finding other similarly situated employment would have required the husband and wife to relocate. Further, the employer never attempted to assist her husband in finding another teaching position or other

employment in the area. The Commission found the employer added "insult to injury" by creating an additional hardship on the employee by requiring her to teach a subject matter she was unfamiliar with at the high school level despite her previous early elementary level teaching position. The Commission found that the employee's subsequent request for a leave of absence was a response to the employer's actions and constituted a constructive discharge.

The Commission in *Mansfield School District* examined not only the superintendent's "break her in order to break the union" comment; they also found that the superintendent maintained his anti-union animus throughout the time period in question. In other words, it was not just one pre-statute of limitations anti-union comment that made the Commission skeptical but, rather, a slew of anti-union comments that severely tainted the credibility of the purported nondiscriminatory reason for cutting the employee's program. Namely, the superintendent made comments to his secretary that he and his wife were not in favor of unions and that the parties' CBA was "ridiculous," and should be cut to two pages. The superintendent also remarked to bargaining unit members that unions were unimportant and a barrier to direct dealing with individuals. The Commission determined that the superintendent's own admissions regarding his feelings toward the union corroborated the testimony of his anti-union statements.

In *Lewis County*, Decision 4691-A (PECB, 1994), the Commission affirmed retaliatory "discharge."[33] In that case, two weeks prior to a representation election, a supervisor wrote a letter to employees disparaging the prospective union and disavowing any "benefits" the employer might be able to offer employees if they voted for the union. His letter encouraged employees to "VOTE NO UNION" on their ballots. An employee wrote a response, telling him she found his letter "threatening and inappropriate." Among other things, she told the supervisor that the vote to unionize was an employee's right, whether it passed or not. After the employee made an inappropriate comment to another employee about her appearance, the supervisor threatened insubordination if she did not apologize to everyone in the office, not just the other employee. The employee agreed to apologize to the affected employee, but refused to apologize to the whole office. As such, the employer found her insubordinate and terminated her employment. The

[33] The Examiner held constructive discharge, not retaliatory discharge. *Lewis County*, Decision 4691 (PECB, 1994).

Commission affirmed the Examiner's decision that the supervisor's summary dismissal of the employee by not giving her more work assignments was substantially motivated by the employee's protected activity of objecting to the supervisor's anti-union letter.

This case is most similar to *Lower Columbia College*, 9171-A (PSRA, 2007). In *Lower Columbia*, the Commission affirmed the Examiner's decision that the complainant had not been deprived of any ascertainable right, benefit, or status in that she failed to demonstrate that she had been terminated, disciplined, or suffered any loss of any benefit from her filing of a ULP complaint. The employee in that case claimed that the employer tried to create a hostile job atmosphere to force her to quit her job. The Commission determined no deprivation had actually occurred as she was not forced to quit her job, and at the time of the decision, had not left her job. The Commission affirmed the Examiner's findings that the employer's nondiscriminatory reasons were supported by substantial evidence. Most importantly, the Commission looked to the lack of witness testimony supporting evidence of discriminatory conduct on the part of the employer. The lack of evidence of disparate treatment or timing between the protected activity and the employer's acts further compelled the Commission to affirm the Examiner's finding that no discrimination occurred. *Id.*

Issue 2(c): No deprivation of an ascertainable right, benefit, or status

The Examiner finds that Hoeller was not deprived of any ascertainable right, benefit, or status. Aside from one directive issued by the college prior to the statute of limitations, like the complainant in *Lower Columbia College*, Hoeller failed to establish that he had been terminated, disciplined, or suffered any loss of benefit from engaging in protected activities or filing ULP complaints. *Lower Columbia College*, 9171-A. Further, like the employer in *Lower Columbia College*, the college's nondiscriminatory reasons were supported by substantial evidence. Hoeller was unable to provide evidence through witnesses or otherwise to support that he received disparate treatment. *Id.* The philosophy department also requested other adjunct faculty to engage in post-file observations and student evaluations. Finally, the timing of the protected activity and the employer's action(s) in this case, like *Lower Columbia College*, lacked probative evidence of a correlation to protected activity. *Id.*

Unlike *Mansfield School District*, the college did not make a slew of anti-union statements throughout the statute of limitations period. While Johanson and Barnes did raise complaints just prior to the statute of limitations regarding both the nature of Hoeller's complaints and that, in essence, he should have come to them first instead of the union, the record lacks evidence of continued disparagement of Hoeller's rights or use of his CBA's grievance procedure. For those instances where he was deprived of a benefit, right, or status, he failed to prove that the employer had discriminated against him due to his protected activities.[34]

Hoeller's documented experiences while at Green River College, while not always pleasant, did not rise to the level of egregious behavior by an employer that would require Hoeller to leave his employment there. The Examiner finds that Hoeller was not constructively discharged by the employer's reduction in the numbers and types of courses normally taught by Hoeller. Therefore, Issue 2(c) is dismissed.

CONCLUSION

For all allegations before this Examiner, Hoeller engaged in protected collective bargaining activity. However, for Issues 1(a), 1(b), 1(d), 1(e), and 2(a), he failed to establish that he was

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[34] Nearly a year after the initial complaint was filed, Barnes and Scott shared a quick e-mail exchange on October 4, 2016. Scott asked, "What are your thoughts on Liz's desire to revisit our post file review policy?"

Barnes replied, "Now that Keith is gone, our concerns are different. But I don't see anything wrong with the policy as it is. We can still skip some observations if we get too busy, but I'd like to retain the right to observe to the maximum some adjunct I might be worried about. I plan to say something like that at the meeting."

Scott answered back, "Thanks. I just wanted to make sure I wouldn't be the only one expressing this sentiment."

Hoeller did not amend his October 29, 2015, or December 8, 2015, complaints prior to the hearing, or ask that the complaint be amended to conform with the pleadings after the hearing began. *See WAC 391-45-070(2).*

Hoeller's brief argues that the new department policy was constructed to get rid of Hoeller *and other adjuncts* who Barnes "might be worried about."

While the October 4, 2016, e-mail exchange between Barnes and Scott seems suspicious of their intentions, absent other supporting evidence to fill in the holes beyond speculation, this evidence alone does not assist Hoeller in meeting his burden of proof to show he was constructively discharged.

deprived of any ascertainable right, benefit, or status by the employer. Therefore, for those issues he was unable to establish a prima facie case for discrimination. Even if a reviewing body were to find he was deprived of any ascertainable right, benefit, or status for those issues, Hoeller failed to establish a causal connection between his statutorily protected activity and the employer's action(s). Withstanding the failure to prove a causal connection, he ultimately failed to establish that the employer's proffered reasons were pretexts or that the employer was substantially motivated by union animus. The allegations listed in Issues 1(a), 1(b), 1(d), 1(e), and 2(a) are dismissed.

For Issues 1(c), 2(b), and 2(c), Hoeller failed to establish that he was deprived of any ascertainable right, benefit, or status by the employer. Therefore, for those issues he was unable to establish the second prong of a prima facie case for discrimination. Hoeller also failed to establish that he was constructively discharged on September 8, 2016. Accordingly, the allegations in Issues 1(c), 2(b), and 2(c) are also dismissed.

FINDINGS OF FACT

1. Green River College (employer or college) is an employer within the meaning of Chapter 28B.52 RCW.

2. Green River United Faculty Coalition is the exclusive bargaining representative within the meaning of RCW 28B.52.020(7) for the employer's full-time and part-time faculty.

3. At the time of the events in question, the union and the employer were parties to a collective bargaining agreement (CBA) dated December 14, 2011, to June 1, 2014. This CBA remained in effect until the execution of the successor CBA on September 12, 2016, effective through June 30, 2018.

4. Community college adjunct faculty in Washington are considered part-time employees, while tenured faculty are considered full-time employees. Both full-time (tenured) faculty and part-time (adjunct) faculty fall under the statutory umbrella of "academic employees,"

and are included in the same bargaining unit at the college. Division chairs are also included in the same bargaining unit.

5. R. Keith Hoeller was an academic employee of the college and bargaining unit employee within the meaning of RCW 28B.52.020(2).

6. From 1991 to 2016, Hoeller taught a variety of philosophy classes as an adjunct professor in the humanities division at Green River College.

7. By filing multiple grievances and advocating for adjunct faculty with the employer, Hoeller engaged in protected activity.

8. Based on Hoeller's numerous grievances and appeals to the college's deans and the board of trustees, the Examiner finds that the employer was fully aware of Hoeller's protected union activity.

9. Hoeller also engaged in protected activity by filing the instant complaints with the Commission. The employer had notice of the filing of the complaint, as evidenced by the certificate of service, as well as the involvement of the administration and the Washington State Attorney General's office in responding to the complaint. As such, the employer was aware of Hoeller's protected activity.

10. Sandra Johanson and Ty Barnes were full-time tenured faculty at the college and alternating leads in the philosophy department. Will Scott was the former chair of the humanities division. Johanson, Barnes, and Scott were in the same bargaining unit with Hoeller.

11. Johanson observed two of Hoeller's philosophy classes (on March 12, 2014, with a report issued April 3, 2014; and on January 20, 2015). Scott observed one of Hoeller's classes on March 5, 2015. Only these observations occurred during the two-year statute of limitations.

12. On March 11, 2013, Johanson and Barnes filed with Scott an "Update of Ongoing Formal Complaint against Keith Hoeller." They cited examples of Hoeller's "failure to collaborate" starting in winter 2009 when Hoeller "chose to go to the Union with a complaint that he was being unfairly forced to participate . . . ." They further noted that "by attempting to bypass the ordinary process for dealing with any complaint, Keith Hoeller has driven a wedge between himself and our department." Johanson and Barnes described another example of Hoeller's "failing to collaborate" in their March 11, 2013, complaint, that occurred on March 4, 2013. Regarding this instance, the update stated, "As usual Keith did not communicate any of his concerns to Ty or me. Instead, he chose to take a hostile approach and file yet another grievance."

13. Based on Johanson and Barnes' complaints, Christie Gilliland, dean of instruction, issued Hoeller a directive on May 2, 2013. Gilliland provided three expectations in the directive:

> 1. Respond to e-mail[s] that request a response in a reasonable period of time.
>
> 2. Comply with requests for student evaluations as part of the contractual adjunct file and post-file evaluation processes and with requests to meet with the department faculty, Division Chair or Dean as requested to discuss any concerns that may arise as a result of those evaluations.
>
> 3. Comply with requests for peer observations as part of the contractual adjunct file and post-file evaluation processes and with requests to meet with the department faculty, Division Chair or Dean as requested to discuss any concerns that may arise as a result of those evaluations.

14. Gilliland's directive advised that it was not a disciplinary action but a copy would be placed in Hoeller's personnel file. Gilliland also wrote, "I will also note that while this is not a disciplinary action, failure to comply with this directive could potentially result in disciplinary action in the future."

15. On October 21, 2013, Johanson and Barnes filed a second formal complaint against Hoeller with Scott. They wrote:

> By filing this grievance and issuing this demand [for a spring 2014 class] to Dr. Brandes, Keith has once again demonstrated an unwillingness to collaborate with the philosophy department to seek equitable solutions to his concerns. We feel that this latest behavior is another example of Keith's failure to fulfill the basic functions of an adjunct according to Article V, Section F of the contract.

16. On December 17, 2013, Joyce Hammer, the dean of English, humanities, and business at that time, responded to Johanson and Barnes' October 21, 2013, complaint. Hammer concluded that no formal disciplinary action would be taken based on the complaint but advised Hoeller that "we do have ongoing concerns with your communication and request you continue to work with your division colleagues to improve the communication both electronically and face-to-face." Hammer further wrote, "Your poor communication includes . . . contacting administrators (see attached letter dated October 2, 2013) to resolve issues in the Humanities Division instead of directly and effectively communicating with the department lead or Division Chair." Hammer concluded her letter advising that in evaluating Johanson and Barnes' complaint, she gave no weight or consideration as to whether Hoeller had filed any grievances.

17. On February 18, 2014, Hoeller filed a grievance alleging CBA violations when Johanson and Barnes conducted student evaluations in two of his classes.

18. On April 3, 2014, Johanson submitted a report of the March 2014 observation she conducted for one of Hoeller's classes and suggested that he stand up and walk around if he were able. She also suggested that Hoeller remind students to take notes and to use the board and PowerPoint presentations. Johanson reported that Hoeller told a personal story she found "quite moving" and noted that the students were "riveted."

19. On November 7, 2014, Barnes e-mailed Hoeller and another adjunct, Marvin Will, to request a post-file review of both observations and student evaluations of their respective classes.

20. On November 20, 2014, Kate Katims, division chairperson, e-mailed Hoeller to advise that there was no record of an observation in his Philosophy 160 (Intro to Philosophy of Science) class. Katims advised Hoeller that Marisela Fleites-Lear volunteered to conduct his observation on November 24 or 25 and explained Fleites-Lear's teaching credentials, including that she taught Hoeller's class while he was out ill. Most importantly, Katims indicated that offering Fleites-Lear to do the observation was an acknowledgment of Hoeller's request that neither Barnes nor Johanson conduct his class observation.

21. On November 24, 2014, Kathryn Re e-mailed Derek Brandes, vice president of instruction, on behalf of Hoeller, raising concerns that the observers assigned to Hoeller's classes lacked impartiality. In particular, Re pointed to Barnes and Johanson as being biased due to the several pending grievances. Re indicated that Katims' proposal to have Fleites-Lear observe did not provide proper notice, violated the CBA, provided insufficient time to involve the union, and did not allow time for Hoeller to prepare. Re did not identify if or how she thought Fleites-Lear lacked impartiality.

22. On December 1, 2014, Hoeller filed a grievance with Brandes seeking a cessation of the "New Humanities Division Policy." Brandes responded on December 3, 2014, denying the grievance but also wrote that he was, "concerned about inconsistent evaluation processes based on modalities."

23. On January 20, 2015, Johanson observed Hoeller and indicated that the students were "very engaged." Further, she noted that Hoeller called the students by name and that they seemed willing and prepared to contribute. She also indicated that his syllabus description did not match the course adoption and revision form and that the syllabus lacked five items.

24. On March 3, 2015, Hoeller sent a letter to Liz Becker, division chairperson, indicating he objected to Scott, Barnes, and Johanson conducting his class observations due to earlier complaints they had filed against him.

25. On March 5, 2015, Scott conducted an observation of Hoeller's class. Scott's report detailed the "solid rapport" Hoeller exemplified with the students and the teaching skills

utilized to address multiple learning styles. Scott's report also suggested to Hoeller a video for class content and that he include an Americans with Disabilities Act (ADA) statement on the syllabus.

26. On March 13, 2015, Becker administered student evaluations in all three of Hoeller's classes, despite his objections about not being present because he was ill.

27. Article V, Section B of the parties' CBA details the job description for a division chairperson. One basic function in that section includes, "evaluating and reporting in matters related to the division." Under Section B (2) Specific Responsibilities and Authority, the chairperson is tasked with ensuring "the evaluation of adjunct faculty members . . . and coordinat[ing] post-file evaluations."

28. Department observations were based on a rubric whereby the evaluator would look at the instructor's strengths and weaknesses and provide the instructor with feedback.

29. Schaefer, interim dean of instruction from April 2014 to June 2017, was hired by the college in 2008 and became a tenured full-time faculty member in 2011. Schaefer explained, "[E]very instructor has areas to improve, so it was encouraged to also provide feedback in those areas as well."

30. Schaefer also testified that "when the student evaluations are being conducted, the person who is being evaluated is asked to leave so that the students feel more comfortable giving their anonymous perspective when filling those forms out."

31. Schaefer was not aware of any observation or student evaluation of one of Hoeller's classes indicating he needed corrective action, discipline, or that would suggest poor teaching quality.

32. The Adjunct Faculty Employment File, also commonly described as the "part-time file," is addressed in Article V, Section P of the CBA. Specifically Article V, Section P (8)(a) provides the criteria for class assignment:

> The division chair in consultation with the division shall coordinate and recommend assignments of adjunct faculty members to the dean. Eligible faculty from the adjunct faculty employment file shall be assigned to available classes before adjunct faculty outside the file are assigned to classes. Assignments will be made fairly and equitably considering seniority, academic preparation, teaching experience and other relevant factors, with consideration given to faculty members" [sic] stated schedule preferences.

33. Hoeller agreed at hearing that there was nothing in Johanson's 2015 observation report that would concern the college or that would suggest a need for performance improvement.

34. The humanities division did not appear to follow the established practice of the dean approving a division policy prior to its implementation. In particular, the department changed its internal policy on the frequency of adjunct faculty observations and the administration of student evaluations, as well as its protocol for the philosophy department's assignment of classes.

35. Brandes' 2012 investigation confirmed that the administration of student evaluations in the humanities classes for adjuncts in the post-file status had been inconsistent.

36. Hoeller vehemently objected to the implementation of the new department evaluation and observation processes and demonstrated his objections through the parties' grievance process.

37. Johanson and Barnes' 2009 and updated 2013 complaints to Scott and Brandes demonstrated their frustration that Hoeller filed grievances with the administration first, rather than talk to them, as department leads first. The tenor of Johanson and Barnes' 2009 and 2013 complaints expressed union animus in their use of such phrases as "go to the union" surrounding Hoeller's choice to file grievances as provided for under the CBA.

38. While Barnes and Johanson were department leads and not Hoeller's supervisors, their first 2013 updated complaint contributed to the issuance of Gilliland's May 2, 2013, directive. That directive threatened disciplinary action if Hoeller failed to comply.

39. The three class observations conducted by Johanson and Scott between October 29, 2013, and October 29, 2015, did not reflect comments out of the ordinary in performance reviews. They offered positive feedback, such as "solid rapport with students," "students were very engaged," and that Hoeller's teaching skills addressed multiple learning styles.

40. The record lacks evidence that the few suggestions for improvement offered by Johanson or Scott were later utilized by the employer to make decisions about Hoeller's subsequent class assignments, lack thereof, or any other tangible employment action.

41. Similarly, the student evaluations that were conducted did not result in any tangible employment action. No student evaluations were introduced at the hearing.

42. By Johanson and Scott conducting observations and Becker conducting student evaluations, Hoeller was not deprived of any actual right, benefit, or status.

43. In her May 23, 2013, report, Daphne Schneider, a contracted investigator, determined that Scott, Johanson, and Barnes filed complaints against Hoeller as a direct result of Hoeller's refusal to work with them and their "resulting frustration." The report determined that Scott, Johanson, and Barnes filed the complaints and conducted themselves without harassment or retaliation. The investigation did not encompass an evaluation of whether Hoeller was discriminated against in connection with his protected union activity but, rather, on whether he had been discriminated or retaliated against, or harassed due to his age.

44. Article V, Section P (9)(a) and (b) of the parties' CBA, effective December 14, 2011, stated:

> a. Student Evaluations: At a minimum, the division shall collect routine student evaluations of adjunct faculty every fourth quarter of employment.
>
> b. Class Observations: Adjunct faculty in the employment file shall be observed during at least one quarter every three years by the division chair, or designated faculty member of the same division.

45. Suggestions for improvement alone, such as those found in the three class observations conducted during the statute of limitations period, are insufficient to find a causal connection between the leads' animus and the administration of the observations and evaluations.

46. The record establishes that the tenured faculty and department chairs either observed or conducted student evaluations of other adjunct faculty, including Smith and Will, outside the bounds of the division's former policy. In other words, the evidence during the two-year statute of limitations period did not establish that Hoeller was targeted for observations or student evaluations by Johanson, Barnes, or Scott based on his protected activity.

47. Hoeller testified that he was not alone in opposing the department's new policy of "increasing monitoring adjuncts by the full-time faculty." Hoeller stated, "I acted in concert with several other adjuncts, including Ron Swift and another woman named Charlotte Fellers." There is no evidence in the record that Swift, Fellers, or any other adjunct faculty engaging in protected activities were subject to a discriminatory application of the department's new observation or evaluation processes.

48. The 2007 full-time tenure track philosophy instructor position announcement required a master's degree but did not contain a requirement for teaching specific courses.

49. The draft versions of the 2015 full-time philosophy instructor position required both a master's degree and an instructor with "experience teaching logic.

50. Hoeller acknowledged that most philosophy professors teach logic. Hoeller did not teach logic.

51. On January 13, 2015, interim dean Schaefer sent an e-mail to Brandes regarding a full-time philosophy faculty position announcement. The posting was for a one-year replacement effective September 2015 to June 2016 to replace Johanson. Johanson and Becker were

courtesy copied on the e-mail. The minimum qualifications included "[e]xperience teaching a symbolic logic course."

52. On January 29, 2015, Schaefer and Barnes exchanged e-mails regarding the position announcement. Schaefer advised Barnes and Johanson that if they wanted to make changes to the announcement there was still time. Schaefer testified that the only change made at that point was to change the position from a one-year term to a tenured position.

53. The February 6, 2015, full-time tenure track philosophy faculty position description read that the minimum qualification was now, "Qualified and willing to teach symbolic logic." Schaefer testified that the wording was changed to allow for a greater pool of applicants.

54. The Examiner finds Schaefer's testimony was credible.

55. Article III, Section B (2) of the parties' CBA discusses the beginning of the full-time faculty selection process: "A job description and closing date for the position shall be written and recommended by the division chair and appropriate dean. The Dean of Instruction shall submit a written job description to the Vice President of Instruction, who will then submit it to the Office of Human Resources."

56. While the CBA allows for full-time faculty input on candidate selection for a full-time faculty position, the actual creation of that position, and ultimate hiring selection for the position, are management rights.

57. A full-time faculty position description that matched Hoeller's skills and abilities was not a "benefit" or "status" that Hoeller himself personally attained or held as a result of his employment at the college.

58. By modifying the position description for a tenure-track position in philosophy in 2015, the college did not deprive Hoeller of an ascertainable right, benefit, or status.

59. Hoeller filed two grievances between November and December of 2014 regarding class assignments based on the part-time file and the new department policy regarding post-file review, respectively.

60. As the new interim dean, Schaefer began the process for creating the new full-time faculty position in the philosophy department in mid-January 2015.

61. While the proximity in time between Hoeller's then-most recent protected activity and the employer's decision to change the position description is of note in the causation analysis, there were no other indicators of causation, such as a pattern of anti-union animus or comparator union-engaged employees.

62. The addition of the experience teaching logic requirement to the 2015 full-time tenure position announcement stemmed from the college's Associate in Arts Direct Transfer Agreement (DTA) program.

63. Upon successful completion of a minimum of 90 credits of the courses offered in the DTA, students are able to transfer to a four-year college as a junior.

64. The "Quantitative Skills/Symbolic Reasoning" component of the DTA requires each student to take a five-credit math class or Philosophy 120, (Symbolic Logic). Symbolic logic is the only nontraditional math class that satisfies the basic math skills requirement. The DTA lists 22 four-year colleges in Washington state and 5 four-year colleges in other states where students may take 90 quarter credits of DTA courses, attain an average 2.0 cumulative grade point average, and will then be granted junior status.

65. Fia Eliason-Creek serves as the employer's director of institutional effectiveness and testified to the importance of the popular DTA program. Eliason-Creek testified that all 34 Washington state community colleges fall under the same DTA agreement.

66. The Examiner finds Eliason-Creek's testimony, as corroborated by the DTA, credible.

67. Hoeller failed to establish that the employer's proffered reasons for the 2015 change to the full-time philosophy faculty position were pretext.

68. The employer met its burden and articulated a legitimate nondiscriminatory reason for amending the full-time philosophy position announcement in 2015.

69. An accounting of Hoeller's compensable sick leave between April 2013 and April 2016 reflects Hoeller took six hours of sick leave in January 2015, nine hours of sick leave in February 2015, and twelve hours of sick leave in March 2015.

70. E-mails between Hoeller and Becker indicated that Becker administered student evaluations in all three of Hoeller's classes on March 13, 2015, while he was absent due to illness.

71. Even if Hoeller had sought clarification from the Commission on the January 6, 2015, preliminary ruling or sought to amend his complaint to reflect winter 2015 academic quarter instead of fall 2015 academic quarter, the record lacked evidence to support that the administration of student evaluations during that time caused any deprivation of an ascertainable right, benefit, or status.

72. The college's administration of student evaluations during winter 2015 academic quarter had no effect on the college's assignment of (or failure to assign Hoeller) classes, did not result in disciplinary action, or other tangible employment action.

73. Hoeller failed to provide evidence that the current department practice or policy required that an instructor be present when his or her student evaluations were conducted.

74. Article IV, Section E of the CBA reads, in pertinent part, as follows:

PART-TIME CLASSES TAUGHT BY FULL-TIME FACULTY

> All full-time faculty members shall have the right of first refusal to teach classes in their regularly assigned instructional area (discipline) outside of the seven (7) hour assignment span as assigned by the appropriate administrator in any academic quarter, including summer, provided a written request is submitted five (5) weeks prior to the beginning of the class offering.

75. Article IV, Section G provides for summer school appointments of full-time faculty: "Course offerings and appointments of summer faculty will be given prior to May 15. Exceptions to this policy will be made by the appropriate administrator(s) after consultation with the division chairperson and the division faculty member."

76. The adjunct faculty employment file, also commonly described as the "part-time file," is addressed in Article V, Section P of the CBA. Article V, Section P (4)(g) addresses how an adjunct faculty member is initially placed in the file, which is forwarded to the department dean after an evaluation process. Once placed in the part-time file, adjunct faculty may be removed

> a. upon the request of the adjunct faculty member, or
>
> b. when the adjunct faculty member fails to accept three (3) consecutive contract offers, or
>
> c. when the adjunct faculty member is not employed for three consecutive quarters (excluding summer), or
>
> d. when the adjunct faculty member is terminated for cause . . . .

77. Adjunct faculty may be terminated for cause upon recommendation from the division or appropriate administrator based on documented evidence.

78. Article V, Section P also provides a non-exhaustive list of examples of when an adjunct faculty member's quarterly contract may be cancelled if his or her services are not needed. Such examples include when a contracted class has insufficient enrollment, when contracted classes are needed to make a full load for a tenured faculty member, or when a program is reduced during the period of the contract.

79. On November 12, 2014, Hoeller filed a grievance alleging unfair and unequal department class assignments to adjunct faculty. He alleged the philosophy department schedule was being manipulated to deny him classes and give them to adjuncts with less seniority.

80. On May 21, 2015, Hoeller e-mailed Barnes and Johanson to inquire when the philosophy department's summer quarter class assignment would occur. Hoeller referenced that he had "long taught two classes every summer quarter, usually PHIL 101 (Introduction) at 9 a.m. and either PHIL 102 (Contemporary Moral Problems) or PHIL 115 (Critical Thinking) at 10:40 a.m." Hoeller's e-mail also noted that the "only classes at 10:40 a.m. [were] PHIL 120 (Logic), which [he did] not teach, and PHIL 240 (Ethics), which Ty [Barnes] [had] taken."

81. Hoeller's May 21, 2015, e-mail also contained a postscript recognizing that there was an option for him to teach an online class of Philosophy 112 (Ethics in the Workplace) as he was "first in the part-time file for it," but that it was "entirely online and would require [his] developing the class from scratch."

82. Once the full-time faculty exercise their right of first refusal in class selection, an adjunct, such as Hoeller who has established himself in the part-time file, *may* be assigned classes. The "benefit" of being senior in the part-time file or the "status" of being senior in the part-time file *still* does not afford an adjunct faculty member an absolute assignment of a certain amount of classes per quarter; nor does it afford an adjunct faculty member classes during a specific time of day or modality (online, hybrid, or in-class) assignment.

83. Hoeller failed to establish that he was deprived of any ascertainable right, benefit, or status by not being assigned classes by the college for the summer 2015 academic quarter.

84. Hoeller engaged in protected activity in proximity to late spring 2015 when he discovered the employer failed to assign him any summer courses for the summer 2015 academic quarter.

85. On December 1, 2014, Hoeller filed a grievance regarding the new humanities division policy.

86. On March 3, 2015, Hoeller wrote to Becker and objected to Scott, Barnes, and Johanson conducting class observations. And in mid-March, Hoeller and Becker exchanged several e-mails about her administering student evaluations.

87. Hoeller's protected activity occurred several months prior to him not receiving any class assignments during the summer 2015 academic quarter.

88. Other than the temporal proximity between Hoeller's protected activity and Hoeller not receiving classes to teach for summer 2015 academic quarter, the record lacked other indicators of causation, such as comparator employees.

89. With the exception of one class, Philosophy 112 (Ethics in the Workplace), all other available summer 2015 academic quarter classes were taken by full-time faculty.

90. Philosophy 112 (Ethics in the Workplace) was offered summer 2015 academic quarter as an online class. Hoeller never taught that class online. The adjunct faculty member to whom it was offered had taught it online 21 times.

91. The college relied on Article V, Section P (8)(a) and cited "other relevant factors" as well as Hoeller's May 21, 2015, e mail about having to develop an online class from scratch as reasons why Hoeller was not offered Philosophy 112 (Ethics in the Workplace).

92. The employer articulated a legitimate nondiscriminatory reason why Hoeller was not assigned classes for the summer 2015 academic quarter.

93. In February 2014, Johanson e-mailed the philosophy department's faculty to advise that the department was thinking of changing the process by which philosophy classes were scheduled. (This process is hereafter referred to as the preference policy).

94. John Fox, an adjunct faculty member, and Hoeller were "tied" for seniority. Since Fox was planning to retire in June 2014, this proposed new process, per Hoeller, would have effectively denied Hoeller his seniority.

95. The proposed new process was eventually implemented as policy in April 2014. The process asked adjuncts to list their "preferences" for which classes they wanted to teach (and, of those, which they were in the part-time file for); how many classes they preferred to teach; which class times they preferred; and if they were willing to teach at the employer's Kent campus.

96. In response to the February 2014 e-mail inquiry, four of the eight adjunct faculty provided several reasons why they disagreed with the proposed new class scheduling process.

97. In an April 21, 2014, e-mail announcing that the new preference policy was going to be implemented in the philosophy department, Johanson wrote, "Since I did not receive any negative feedback, we are going to move ahead with this experiment."

98. Fox's response to department faculty on February 28, 2014, stated:

> My hope would be that, seniority or not, [classes] would be filled equitably by this present faculty.
>
> Further, and this is merely a wish, I would like it if the present animosities which center on Keith -- justifiably or not --
>
> be disregarded when it comes to allocating jobs. No doubt he has antagonized some of you by his political activities,
>
> activities which would irritate anyone, but it would be petty to use rationalizations about 'improving the department' to
>
> adopt policies which remove our local gadfly -- or even impinge on his income.

99. While Fox's e-mail could be construed as supportive of Hoeller, he also wrote:

> And Keith [Hoeller], I stand by

> my assertion that you owe Andrew an apology -- a heartfelt, earnest apology. Whats [sic] more, if you can't see your way
>
> to doing this, then you are simply opting for this absurd status quo of phony collegiality and don't deserve the concern[.]
>
> I am voicing here for your career. What? You say you are not guilty of anything? Grow a pair and apologize anyway.....
>
> Take responsibility for the offenses people feel you have committed. This will require courage and grace. Are you up
>
> to it?

100. The philosophy department's new class assignment preference policy was implemented just as Hoeller became the most senior adjunct. Despite the questionable timing and intent, there is insufficient evidence to establish that the policy itself led the employer to not assign Hoeller classes in the summer or fall of 2015.

101. Hoeller failed to establish that the employer's proffered legitimate nondiscriminatory reasons for not assigning him classes for summer academic quarter 2015 were pretexts or that the employer was substantially motivated by union animus in doing so.

102. The college offered Hoeller two of his three preferred classes for fall 2015 academic quarter. His third choice was offered to a full-time faculty member.

103. The college offered Hoeller an alternate third philosophy class for fall 2015 academic quarter and he declined because he did not want to teach an evening class.

104. Adjunct faculty are not guaranteed class assignments under the parties' CBA.

105. Hoeller failed to establish that the college deprived him of an ascertainable right, benefit, or status when he was offered three classes to teach at the college for fall 2015 academic quarter and he declined one of them.

106. Hoeller filed a second amended complaint on January 2, 2018, alleging employer discrimination, harassment, and reprisal for filing the October 29, 2015, ULP complaint.

107. Hoeller began teaching courses at Highline College in Des Moines, Washington, in the fall 2015 academic quarter. He also taught two classes at Green River College during the same quarter.

108. On December 15, 2015, Hoeller e-mailed Barnes, Becker, Freitas, and Schaefer declining to teach at Green River College during the winter 2016 academic quarter. Hoeller's e-mail advised he would be teaching at Green River College in the spring 2016 academic quarter and asked to be kept informed about the spring quarter via his personal e-mail account.

109. In a February 9, 2016, e-mail, Schaefer advised Hoeller that "[a]s a courtesy since [he was] not teaching at GRC [that] quarter," she was e-mailing him at his personal e-mail so he could turn in his "preference form" for the spring schedule to Barnes by February 12, 2016.

110. On February 12, 2016, Hoeller replied to Barnes regarding the spring 2016 academic quarter,

> It is very late in the process. Spring Registration has already started, and there are very few courses I can teach due to scheduling conflicts with another college who confirmed my teaching schedule months ago. So I will not be teaching at Green River College this Spring, for the second quarter in a row.

111. On April 15, 2016, Hoeller e-mailed Barnes and Ferreira to inquire about summer 2016 academic potential class assignments. He advised them that though he had requested to be kept informed via his personal e-mail, he had not heard anything from the college since February 2016.

112. Barnes responded on April 15, 2016, and shared an e-mail from earlier in the week of the department requesting class preferences from instructors. Barnes advised Hoeller to

check his college e-mail and allowed Hoeller an additional week, until April 22, 2016, to reply with his preferences for fall 2016 academic quarter.

113. On April 19, 2016, Hoeller replied to Barnes and courtesy copied several administrators, including Becker. He again requested class schedules for both summer and fall 2016 academic quarters.

114. Becker replied to Hoeller later on the morning of April 19, 2016: "You can surmise that if you haven't been contacted regarding summer quarter offerings, you are not being offered summer classes."

115. A review of the philosophy classes offered to students by the college for summer 2016 academic quarter reveals that seven classes were initially offered, with one section of Philosophy 120 (Symbolic Logic) cancelled. Of the remaining six classes, five were taught by full-time faculty Barnes and Ferreira, and the sixth was a Philosophy 120 (Symbolic Logic) class taught by Jeffery. Again, Jeffery was part-time faculty, and Hoeller did not teach Philosophy 120 (Symbolic Logic).

116. Hoeller failed to establish that the college deprived him of an ascertainable right, benefit, or status by the college's failure to assign him classes for the summer 2016 academic quarter.

117. The employer offered Hoeller three classes for fall 2016 academic quarter.

118. Hoeller declined the three classes offered by the employer for fall 2016 academic quarter.

119. Hoeller failed to establish that the college deprived him of an ascertainable right, benefit, or status by offering him three classes for the fall 2016 academic quarter.

120. On September 8, 2016, Hoeller sent Morgan, the college's president, a letter which began,

> Although I have taught about two hundred courses at Green River College since 1991, was the College's first adjunct to receive the Distinguished

> Faculty Award in 2012, and am now scheduled to teach three philosophy courses this Fall Quarter 2016, I feel I have no choice but to decline this Fall Quarter teaching assignment. I am taking this action as a direct result of the continuing pattern of harassment I have been subjected to by Green River College, which has created and perpetuated a hostile work environment.

121. Hoeller failed to establish that he had been terminated, disciplined, or suffered any loss of benefit from engaging in protected activities.

122. Hoeller failed to establish that he was constructively discharged by the college on September 8, 2016. Hoeller voluntarily resigned and ultimately retired in December, 2016.

123. Hoeller's documented experiences while at Green River College, while not always pleasant, did not rise to the level of egregious behavior by an employer that would require Hoeller to leave his employment there.

124. Hoeller was not constructively discharged by the employer's reduction in the numbers and types of courses normally taught by Hoeller.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 28B.52 RCW and Chapter 391-45 WAC.

2. Based on findings of fact 1, 5, 6, 7, and 9, the complainant engaged in protected activity as provided under Chapter 28B.52 RCW.

3. Based on findings of fact 1 through 8, and 10 through 47, the employer did not discriminate in violation of RCW 28B.52.073(1)(c) by assigning faculty members with a history of animosity toward Hoeller to observe and evaluate his teaching since October 29, 2013.

4. Based on findings of fact 1 through 8, and 48 through 68, the employer did not discriminate in violation of RCW 28B.52.073(1)(c) by modifying the position description for a tenure-track position in philosophy in order to exclude Hoeller from qualifying for the position since January 2015.

5. Based on findings of fact 1 through 8, and 69 through 73, the employer did not discriminate in violation of RCW 28B.52.073(1)(c) by insisting on evaluating Hoeller's teaching during the fall 2015 academic quarter while Hoeller was sick with the flu.

6. Based on findings of fact 1 through 8, and 74 through 101, the employer did not discriminate in violation of RCW 28B.52.073(1)(c) by failing to offer teaching assignments to Hoeller for the summer 2015 academic quarter.

7. Based on findings of fact 1 through 8, and 74 through 105, the employer did not discriminate in violation of RCW 28B.52.073(1)(c) by modifying the course offering schedule to deny Hoeller an opportunity to teach more than two courses during the fall 2015 academic quarter.

8. Based on findings of fact 1 through 6, 9, and 106 through 116, the employer did not discriminate in violation of RCW 28B.52.073(1)(d) by failing to offer Hoeller teaching assignments for the summer 2016 academic quarter.

9. Based on findings of fact 1 through 6, 9, 106 through 113, and 117 through 119, the employer did not discriminate in violation of RCW 28B.52.073(1)(d) by failing to offer Hoeller more than two classes for the fall 2016 academic quarter.

10. Based on findings of fact 1 through 6, 9, and 74 through 124, the employer did not discriminate in violation of RCW 28B.52.073(1)(d) by reducing the number and types of courses normally taught by Hoeller thereby causing him to be constructively discharged on September 8, 2016.

ORDER

The complaints charging unfair labor practices filed in the above-captioned matters are dismissed.

ISSUED at Olympia, Washington, this 20th day of December, 2018.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

PAGE A. GARCIA, Examiner

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

RECORD OF SERVICE

ISSUED ON 12/20/2018

DECISION 12528-B - CCOL has been served by mail and electronically by the Public Employment Relations Commission to the parties and their representatives listed below.

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CASE 127690-U-15

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